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In The

Supreme Court of the United States

October Term, 1975

No. 75-42

JOSEPH DI NAPOLI,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT AND APPENDIX

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In The

Supreme Court of the United States

October Term, 1975

No.

JOSEPH DI NAPOLI,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Joseph DiNapoli[1] moves that a writ of certiorari issue to review a judgment of the United States Court of Appeals for the Second Circuit, entered on March 7th, 1975,[2] affirming the judgments of conviction previously entered on May 7th, 1974, in the United States District Court for the Southern District of New York (Honorable Kevin Thomas Duffy, D.J.) wherein DiNapoli received consecutive terms of fifteen (15) years for conspiracy to violate the federal narcotic laws and five (5) years for possession and distribution of narcotics, with an additional special parole of three (3) years.[3] The total cummulative sentence was twenty (20) years with a special parole of three (3) years.

1. Hereinafter petitioner Joseph DiNapoli will be referred to as "DiNapoli."

2. Petition for Rehearing denied April 28th, 1975.

3. Statutes involved 21 U.S.C. §§812, 841. Conspiracy charged DiNapoli and thirty-two other named defendants (seventeen of whom were tried with him) with unlawful

(Cont'd)

OPINION BELOW

After imposition of judgments against DiNapoli, direct review was sought in the United States Court of Appeals for the Second Circuit. On March 7th, 1975, the Court of Appeals affirmed the judgment as to DiNapoli and thirteen (13) others and reversed as to two (2) appellants in a written opinion, *United States v. Tramunti, et al,* ___ F.2d___(2nd Cir. 1974) (1a).[4] Petition for Rehearing was denied April 28th, 1975 (63a).

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

This case involves the search and seizure provisions of the Fourth Amendment and the Due Process Clause of the Fifth Amendment to the United States Constitution, which are as follows:

(Cont'd)

agreement to distribute heroin from January 1st, 1969, until the fall of 1973. The substantive count charged DiNapoli with distribution of two kilos of heroin "In or about the month of December, 1971."

4. Pagination citations in parentheses followed by letter "a" are references to petitioner DiNapoli's appendix. References to the original record filed in the United States Court of Appeals for the Second Circuit carry the letter "R" followed by the pagination. Pagination references preceded by the letters "RS" refer to the evidentiary hearing on the motion to suppress the seizure of approximately one million dollars which was conducted pretrial. References to "GB" in parentheses are to the Government's brief filed in the United States Court of Appeals.

Fourth Amendment

The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures, shall not be violated and no warrants shall issue, but upon probable cause, supported by oath or affirmation and particularly describing the place to be searched, and the persons or things to be seized.

Fifth Amendment

No person shall . . . be deprived of life, liberty, or property, without due process of law. . . .

QUESTIONS PRESENTED FOR REVIEW

On February 3rd, 1972, law enforcement officers of the New York Joint Task Force attempting to execute on a "John Doe" warrant unrelated to DiNapoli stopped by chance a private car on a public thoroughfare occupied by DiNapoli as a passenger and driven by an acquaintance Vincent Papa,[5] arrested both and thereafter searched and seized from the automobile almost one million dollars in cash from a suitcase.[6]

The seized money was not related by the Government by direct proof with the illicit traffic in narcotics. The Government by its quantum attempted to create an inference of criminality.

5. Papa was subsequently named an unindicted co-conspirator.

6. The exact amount claimed by the Government was $967,450.

The only other evidence at trial adduced by the Government against DiNapoli was testimony from informer and co-conspirator Harry Pannirello, who claimed that although he never dealt nor spoke with DiNapoli about drugs he had heard from others that DiNapoli was a source of supply.[7]

The following questions were passed upon by the Court of Appeals and are presented for review by this Court:

1. Was the arrest of DiNapoli predicated upon probable cause where the only evidence adduced against him was that he was carrying a suitcase in and out of his home into an automobile bearing dealer's plates and driven by a narcotic's violator?

2. Was the motion to suppress evidence of the seizure of a million dollars from the automobile in a closed suitcase erroneously denied after the evidence demonstrated that law enforcement officials were merely curious as to the contents of the valise?

3. In the alternative, should the District Court have minimized the prejudicial effect of the million dollars by limiting the quantum seized at trial to an amount commensurate with the alleged heroin sold by DiNapoli of approximately $21,000 to $63,000?

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7. As a matter of fact Pannirello who claimed to have met DiNapoli only once could not identify him in the courtroom on the first day of his testimony after being asked to do so by the Government prosecutor. The following day after the prosecutor spoke with Pannirello reference his inability to make the identification Pannirello returned to the witness stand and identified DiNapoli.

4. Did the District Court improperly deny DiNapoli's Rule 29 F.R.C.P. motion for judgment of acquittal on the basis of the insufficiency of the evidence on either the conspiracy or substantive count in light of the testimony of the one witness who testified against DiNapoli claiming that he never spoke or dealt in drugs with DiNapoli but merely heard from others that DiNapoli had supplied narcotics?

5. Was DiNapoli entitled to an acquittal and a reversal of the judgment of conviction on the basis that the Government proved at the very most the existence of at least two separate conspiracies?

STATEMENT OF THE CASE

1. The Million Dollar Seizure

It was pouring rain the night of February 3rd, 1972, as New York Joint Task Group Supervisor instructed New York Detective John Spurdis and City Patrolman George Reilly to attempt to locate the subject of an outstanding arrest warrant, known only as "John Doe." The warrant was the result of a narcotics transaction which had been witnessed by Detective Spurdis five months earlier in a Bronx tavern called the Cottage Inn (RS17, 90-91).[8] Spurdis had overheard an incriminating conversation between a Francis Facchiano and an unidentified individual, as a result of which a James Kersey had been arrested in September and Facchiano in January, 1972 (RS90-91). Since Spurdis could identify the John Doe, he was assigned, with Reilly, to look for him.

8. Spurdis believed the other officers could also identify John Doe, since they were outside the bar when Spurdis made the September, 1971, observation (RS220-221).

The search for "John Doe" took the officers first to Spencer Drive, then to the Cottage Inn, with negative results (RS20). The officers then drove to 1908 Bronxdale Avenue, a two story private dwelling (RS21). This address was selected because Reilly had arrested Joseph DiBenedetto, the owner or manager of the Cottage Inn, for automobile theft in October, 1971, and DiBenedetto had given 1908 Bronxdale as his address (RS38-39-218). Also, Spurdis had seen an unidentified male conversing with Facchiano some six months before in front of the Cottage Inn bar. The unidentified person was then seen entering a Buick registered to Genevieve Patalano, of 1908 Bronxdale (RS22, 217).

It was raining very, very hard that evening (RS47, 60). Visibility was poor (RS39, 388). Nonetheless Spurdis and Reilly parked their car on the street near 1908 Bronxdale and waited (RS22). About eight forty-five p.m., Spurdis and Reilly saw a 1968 Pontiac pull up in front of 1908 Bronxdale, and a white male exited from the passenger side of the car, carrying a suitcase (RS22). As the passenger entered the house, the driver of the Pontiac made a U-turn for a parking place on the other side of the street. Spurdis and Reilly also made a U-turn to get behind the Pontiac (RS23). As they drew abreast of the vehicle, Reilly and Spurdis identified Vincent Papa as the driver. Papa looked at them, then went into the house (RS24).

Reilly testified that he immediately radioed the group supervisor, Pallatroni, and told him "We have a VIP here with a suitcase. You had better get over here" (RS25). Spurdis testified that he had radioed the message to Pallatroni (RS225). In any event, the message was meant to convey that Vincent Papa

was under surveillance, the initials being a code for Papa (RS25).

Pallatroni arrived around 9:00 p.m. Spurdis told him what had been observed (RS25). Three women then left the house and returned about ten minutes later (RS26). Pallatroni claimed that he radioed in the license number on the Papa vehicle and ascertained that it was registered to "Wide World Leasing Company" of Far Rockaway, Queens (RS102).[9] The officers then saw a white male emerge and drive off (RS26). Pallatroni and his partner Reed, followed this car, observed the driver make a turn that took him "in a complete circle" (RS106), then they returned to Bronxdale Avenue. There, they saw two more men leave the house and drive off in separate cars (RS26, 106).

Finally, about 9:30, Spurdis and Reilly saw Papa and the unknown male who had carried the suitcase into the house come out. The unknown male was still carrying a suitcase, which the officers thought but weren't positive was the same suitcase (RS28). He was carrying the suitcase with two hands and it appeared heavy (RS36).

Papa and the other man entered the Pontiac and placed the suitcase in the back seat of the car. Papa drove off with the other man in the passenger seat (RS28).

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9. At a subsequent trial entitled *United States v. Papa*, Docket No. 74 Cr. 751 U.S.D.C.S.D.N.Y., now on appeal to the United States Court of Appeals for the Second Circuit, the Government introduced the same million dollars on still another conspiracy. The evidentiary hearing at that trial on another motion to suppress the million contradicted the information that Pallatroni claimed to have received.

After the car had driven away with both Pallatroni's and Spurdis' car following it, a decision was made to arrest Papa and his passenger and have a look in the suitcase. The testimony is in sharp conflict about who made the decision. Pallatroni swore that he personally ordered Spurdis to arrest the occupants of the Papa car (RS108). Spurdis swore that he had made the decision, when Pallatroni indicated reluctance to "hit the car" (RS234-236).

With Spurdis driving, according to Reilly, the unmarked police car pulled abreast of the Pontiac, Reilly flashed his badge at Papa (RS29), after which Papa pulled over, stopped, got out of the car and walked back to the police vehicle (RS29-30). Spurdis' testimony had his and Reilly's roles reversed (RS239).

Papa was immediately handcuffed (RS62). Pallatroni and Reed then went to the passenger's side of the car and handcuffed the passenger, who was later identified as DiNapoli. In the meantime, Spurdis seized the suitcase and opened it (RS62). Pallatroni asked Spurdis, "What do we have, John?" Spurdis replied, "Money." Pallatroni said, "Any Junk?" (RS109). There was none.

Later that night, on Spurdis' affidavit, a search warrant[10] was obtained and executed on the premises of 1908 Bronxdale. No narcotics or other incriminating evidence was found therein (RS67, 246). Nor was any such contraband or evidence found on the persons of Papa or DiNapoli.

Neither Papa nor DiNapoli was connected with the transaction which Spurdis had observed in the Cottage Inn five

10. The Government could not produce the affidavit upon which the search warrant issued.

months before. Neither of them was the John Doe for whom the officers had been seeking to execute an arrest warrant. The mission which had brought the officers to 1908 Bronxdale did not figure in the decision to arrest Papa and DiNapoli (RS154).

Although the February 3rd, 1972 arrest of Papa and DiNapoli resulted in the filing of a magistrate's complaint against them, the complaint was dismissed within a few weeks of the arrest (RS65).

The United States Court of Appeals found that the officers had probable cause to stop and arrest Vincent Papa and Joseph DiNapoli . . . and had probable cause to search the automobile for contraband (28a).

2. The Alleged Conspiracy

The Government sought to prove the existence of two separate organizations forming one net-work and a single conspiracy to distribute drugs in New York, New Jersey and Washington, D.C. One branch was allegedly led by DiNapoli while the other by Inglese.[11] The Court of Appeals in rejecting the argument of multiple conspiracies pointed to Barnaba[12] and Mamone[13] as the links between the two organizations (RS2136-2137), the fact that Pugliese, a member of the DiNapoli organization had intimate knowledge of the Inglese operation (RS2137-2138) and Papa was the supplier for both organizations (RS2138).

11. Inglese was convicted after trial. He did not testify.

12. Barnaba was a Government witness. He was a named co-conspirator. He never claimed to know DiNapoli.

13. Mamone was an indicted co-conspirator, convicted after trial. He did not testify.

For purposes of the facts on this issue considered by the Court of Appeals, we quote verbatim from the filed opinion (6a-15a):

> "At trial, five participants in the alleged conspiracy testified to its operations and personnel: John Barnaba, Frank Stasi, Henry Pannirello, Thomas Dawson and James Provitera. Their collective testimony, summarized below, and corroborated extrinsically in certain details, established the existence of a large, well organized conspiracy to buy, process and distribute narcotics in New York, New Jersey and Washington, D.C."

I. John Barnaba's Testimony.

John Barnaba was a middle level distributor in the narcotics conspiracy here charged. Initially he worked for and purchased narcotics through Inglese who was a principal in one branch of the narcotics operation. Subsequently, Barnaba worked for the other major branch of the operation headed by DiNapoli and Pugliese (see III, below). Owing to his unique position, Barnaba's testimony thus served to develop the general framework of the entire conspiracy and identify most of its major participants. From that testimony the jury may be taken to have found as follows.

A. The Louis Inglese Operation: Inglese, Christiano, Mamone.

Barnaba's latter-day involvement in the business of distributing narcotics began in 1969, in response to request from

a would-be customer, Richard Forbrick. In July of 1969, Barnaba met with appellant Inglese, whom he had known for some 15 years, and asked if Inglese could supply him with "goods." Inglese said that he could and told Barnaba that he could be reached at the Beach Rose Social Club or Beach Rose Club, located at 3202 Wilkinson Avenue in the Bronx.

The following month, Barnaba in the Beach Rose Club placed an order with Inglese for a quarter kilogram of heroin (at a price of $5,500) and the same amount of cocaine (at $3,000), or, in the parlance, "a quarter of H and a quarter of coke." Inglese's associates, DelVecchio and Christiano, passed the narcotics to Barnaba later that night. Barnaba then delivered the heroin to Forbrick and the cocaine to Forbrick's customer, Benjamin Tolopka. When Barnaba later made payment to Inglese for these drugs he was told that in future transactions payment had to be in advance of delivery.

In September and early November of 1970, Barnaba made three more purchases of drugs from Inglese. In late November of 1970, while Barnaba was making yet another such purchase, he came in contact with appellant Mamone. Mamone, who was present at the Beach Rose Club when Barnaba was making a payment to Inglese, was summoned by Inglese, and together they counted Barnaba's payment.[14] Subsequently, Mamone was to be of considerable assistance to Barnaba in his narcotics dealings.[15]

14. On this occasion, the delivery of the heroin to Barnaba was made later that night by Christiano in the presence of Inglese and DelVecchio, in the back yard of Inglese's residence in the Bronx.

15. Barnaba testified that Dilacio, a member of the DiNapoli/Pugliese operation, informed him that "Butch" Mamone was DiNapoli's partner in the narcotics business. *(Cont'd)*

In December, 1970, Barnaba paid Inglese $3,500 received from Forbrick for an eighth of a kilogram of heroin. When after ten days or more Inglese was unable to supply the "eighth," Forbrick asked Barnaba to get back his $3,500. Barnaba went to the Beach Rose Club to tell Inglese of Forbrick's concern, suggesting in Mamone's presence that Inglese meet Forbrick in order to allay the latter's fears and to make it possible for him to deal directly with Inglese should something happen to Barnaba. Inglese replied that he did not want to meet Forbrick, but when Mamone, who was listening, made assurances that (in Barnaba's words) "he was all right, . . . he knew his wife, . . . he was okay, there was nothing wrong with him," Inglese relented. After Mamone had vouched for Forbrick, Barnaba introduced Forbrick to Inglese at the Club and Forbrick accepted Inglese's suggestion that he await delivery. After additional delay in delivery of this order, however, Barnaba, at Forbrick's urging, recovered the $3,500 from Inglese and returned it to Forbrick.

After a brief hiatus in early 1971, Barnaba resumed his narcotics dealings in June, 1971, when he obtained $3,000 worth of narcotics from Inglese for sale to a new customer named Burke. Burke was dissatisfied with the quality of the drugs and demanded the return of his money. In an attempt to get the money, Burke sent two men, one carrying a gun, in search of Barnaba, and later Burke himself sought out Barnaba at his home.

Barnaba later mentioned the Burke affair to Inglese at a time when Mamone was present; Mamone told Barnaba that he

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(Cont'd)

This hearsay testimony was admissible against Mamone once it was established that Mamone was a member of the conspiracy, and against DiNapoli once it was established that he was a member of the conspiracy. *United States v. D'Amato*, 493 F.2d 359 (2d Cir.), *cert. denied*, 43 U.S.L.W. 3208 (U.S. Oct. 15, 1974).

would contact Burke to try to "straighten out" Barnaba's problem. Mamone told Barnaba that Burke was also his customer and that Burke owed him $25,000 or so. Two or three days later outside the Beach Rose Club at a meeting filmed by a city detective Mamone informed Barnaba that he had told Burke to deduct the $3,000 from the money owed by Burke. Mamone said that now Barnaba owed him the $3,000. Mamone's call on Burke was apparently successful, for Barnaba never heard from him or his gun-carrying friends again.

B. The Joseph DiNapoli Operation: DiNapoli, Pugliese, Dilacio.

In July or August of 1971, Barnaba met appellant Frank "Butch" Pugliese outside of the Beach Rose Social Club. Barnaba's drug business was "doing bad," possibly because of a shortage of customers or supply. In any event, Pugliese introduced him to a new customer, John "Hank" Springer, informing the latter that thereafter if he needed anything he should get it from Barnaba. Pugliese, who was soon to go to jail, then introduced Barnaba to Pannirello and defendant Dilacio, telling these two that they should supply Barnaba with heroin on consignment, the price being agreed upon at $25,000 per kilogram. A few nights later Barnaba filled Springer's order for one-eighth of a kilo of heroin at $3,500 with heroin obtained from Dilacio at $3,000. Thus, Barnaba was accepted into what will be seen as the DiNapoli-Pugliese branch of the conspiracy. While Inglese had required that Barnaba pay *in advance* for his drug purchases, Barnaba worked on consignment with the Pugliese-DiNapoli group. Barnaba continued to work with Pannirello and Dilacio, selling drugs obtained from them to

Springer and appellant Russo, until November, 1972, when he (Carnaba) was arrested on narcotics charges by the New York City police.

II. Frank Stasi's Testimony: Inglese, Ceriale, D'Amico.

The testimony of Frank Stasi, in the light most favorable to the Government, served to develop further the workings of the Inglese narcotics operation. Stasi, who worked for a time as a steward at the Beach Rose Social Club, had frequent contact there with Inglese, DelVecchio, Mamone and Christiano.

Stasi was involved in a series of at least eight "mixing sessions," some at his own apartment, some at DelVecchio's apartment. In each of these he, DelVecchio, on one occasion Christiano and on two occasions defendant Lentini mixed three kilograms of heroin with the dilutant mannite to obtain 12 half-kilogram packages.[16] Much of the mannite was obtained from appellant Ceriale at a price of $2,000 for three kilos. For all but the first mixing session, Inglese paid Stasi $2,000, the payments taking place at the Beach Rose Social Club, the "Blue Lounge" or in Inglese's own basement. Occasionally Stasi was paid by Inglese after the latter's receipts were counted by the two of them, DelVecchio and on one occasion Christiano. Money, totaling $30-40,000 each time, was counted and separated into stacks of $1,000.

16. Objective proof of the "mixing sessions," four of which took place at Stasi's own apartment, was obtained by a forensic chemist who, after Stasi's arrest, obtained a trace of heroin from between the leaves of Stasi's kitchen table and traces of mannitol (the main ingredient of mannite) under the refrigerator.

The Inglese group had operated out of the Beach Rose Social Club for some time, but when in April, 1972, it was discovered (by a tip from some men working on the elevated railway on Wilkinson Avenue) that the Club was under police surveillance, LoPiccolo's Espresso House became a center for the narcotics business. A substantial amount of Stasi's testimony dealt with meetings at LoPiccolo's, and conversations overheard there involving Inglese's alleged partner, Carmine Tramunti, who ran a card game there. A more detailed statement of the facts involved in these conversations will be developed later in discussing appellant Tramunti's participation in this conspiracy.

Stasi also recounted obtaining a small amount of cocaine and using it as a sample which he gave to appellant D'Amico at the Centaur Bar on 46th Street in Manhattan, and subsequently a $7,000 heroin sale from Stasi to D'Amico.[17]

III. The Testimony of Harry Pannirello, Jimmy Provitera and Thomas Dawson.

The testimony of Pannirello, Provitera and Dawson, again in its best light from the Government's point of view, revealed in detail the inner workings of the DiNapoli-Pugliese sphere of the narcotics distribution operation. Each of these three played an important role in providing a supply of narcotics to a number of middle level distributors.

17. This meeting at the Centaur was observed by a plainclothes police officer. After Stasi's arrest on May 22, 1973, he agreed to cooperate with police. He was released and is in federal protective custody, having assumed a new identity.

A. The Pugliese-DiNapoli Operation: Alonzo, Hattie Ware and DiNapoli.

In April, 1970, Pugliese introduced Pannirello to appellant Hattie Ware and to two fugitive defendants, Basil Hansen and his wife Estelle ("Bunny"), and the late Al Greene, distributors who operated out of two apartments in a building at 1380 University Avenue in the Bronx. Thereafter Pannirello delivered numerous packages of narcotics to Greene and Basil Hansen, with Hattie Ware often present. Pannirello and his associate, Dilacio, sometimes paid Hattie Ware to deliver to the same two distributors.

On one occasion the appellant Alonzo, Hattie Ware's brother, asked Pannirello if he could obtain an amount of heroin "to start off small." Pannirello offered Alonzo two ounces of heroin for $2,000 and Alonzo accepted, paying only $1,000 or $1,500, however.

Thereafter, Provitera, Pannirello's brother-in-law, started making narcotics deliveries at 1380 University Avenue. On the first of these, Pannirello introduced him to Hattie Ware and Alonzo. Eventually, Basil Hansen arrived; Alonzo, Pannirello, Provitera and Hansen went to Alonzo's bedroom where Provitera and Pannirello handed a package of heroin to Hansen. Provitera subsequently delivered packages to Ware for Basil Hansen, as well as directly to Hansen in the street outside the University Avenue apartment house.

Pannirello also had direct dealings with appellant Joseph DiNapoli. In June of 1971 Pannirello accompanied Pugliese to

the residence of Genevieve Patalano, DiNapoli's girlfriend, at 1908 Bronxdale Avenue in the Bronx. At this time Pugliese indicated that he was working with or for DiNapoli and that he had money to be delivered. He had decided, however, not to give DiNapoli all the money, but instead hid some of it in a sock. DiNapoli accepted this money, some $8,000 or $10,000, without even counting it all out.

Pugliese went to jail in October, 1971. Before he left, he turned over some of his narcotics business to Pannirello and Dilacio. Pugliese told Pannirello and Dilacio that he was leaving two kilograms of heroin and some cash with them. It was agreed that Dilacio was to be the sole contact with DiNapoli, paying DiNapoli $22,000 per kilogram of heroin, and taking it to a "stash," whence Pannirello would make future pick-ups and deliveries. Pannirello and Dilacio were also to deliver narcotics on consignment to Barnaba at wholesale prices. Dilacio was to pick up two kilograms immediately from DiNapoli and store them in Pugliese's garage. Pannirello and Dilacio were to pay over some of the profits to Pugliese's wife but to save the rest until Pugliese's release, whereupon they were to divide it up.

The next night Pannirello went to the "stash," a garage near Pugliese's house, obtained a half kilogram of heroin, and delivered it to Thomas "Tennessee" Dawson, one of Pugliese's customers from Washington, D.C., for $16,000 in cash. Pannirello then distributed the remaining one and a half kilograms among Barnaba, Basil Hansen and Al Greene.

Five or six months after Pannirello saw DiNapoli accept drug money from Pugliese, in late November or December,

1971, Dilacio told Pannirello that he had called DiNapoli to get some heroin and that DiNapoli was going to furnish him a kilogram for $22,000.[18] Dilacio said he would pick up the heroin from DiNapoli and take it to a "stash" at appellant John Gamba's house. Pannirello went to Gamba's house, met Dilacio and examined the kilogram of heroin in Gamba's presence. Gamba was paid $300 a week for storing the heroin. On one occasion in December, 1971, or January, 1972, in Pannirello's presence, Dilacio called "Joe" [DiNapoli] on the phone to buy narcotics but, as Dilacio told Pannirello, "Joe told him to sit tight and he'll let him know as soon as something comes up, but there was nothing happening right now."

Further evidence as to DiNapoli was obtained on February 3, 1972, while agents of the Joint Narcotics Task Force were conducting surveillance of his lady friend's house at 1908 Bronxdale Avenue in the Bronx. At about 8:45 p.m. Vincent Papa (an unindicted co-conspirator) drove up with Joseph DiNapoli at his side. DiNapoli left the vehicle carrying a large suitcase. An officer conducting the surveillance testified that the suitcase was being carried with one hand and appeared light. Sometime later, Papa and DiNapoli left the house, the latter carrying what appeared to be the same suitcase; now, however,

18. Hearsay cannot, as we said in *United States v. Cirillo*, 499 F.2d 872, 885 (2d Cir. 1974), "be used as a supplement to, much less as a substitute for, insufficient nonhearsay proof." Hearsay implicating one conspirator from a co-conspirator is admissible, however, once there is sufficient independent evidence to show the first to be a member of the conspiracy. *See United States v. D'Amato, supra* note 12; *United States v. Manfredi*, 488 F.2d 588 (2d Cir. 1973), *cert. denied*, 43 U.S.L.W. 3667 (U.S. June 3, 1974). There is no confrontation problem where both declarant and listener knew themselves to be members of the conspiracy at the time the statement is made. *United States v. Mallah*, No. 74-1327 (2d Cir. Sept. 23, 1974), slip op. 5475, 5487-88.

the police officer testified, DiNapoli was carrying it with two hands, as if it were heavy. Both men got back in the car and after driving seven blocks were arrested. The arresting officers opened the suitcase and found that it contained $967,450, principally in $100 and $50 bills.[19]

There are substantial legal and factual disputes in connection with this seizure, the appellants contending that the police lacked probable cause to make the seizure. Therefore the facts will be stated in greater detail below in connection with the discussion of the issues raised by the seizure and the introduction of the $967,450, or more accurately a photo of same, into evidence.

The Government's case against DiNapoli also include testimony of Pallatroni and Reilly who told the million dollar seizure story to the jury (RS3605). A photograph of the money was also introduced (RS3657). As a fillip, the Government elicited from Dawson, a customer of Pannirello's that, in February, 1972, Pannirello said he had lost his connection since

19. The defense presented evidence that DiNapoli was a major participant in the loanshark or shylocking business (for which he was convicted and sentenced to three years imprisonment), and the argument was that the suitcase money came from this other form of illegitimate enterprise. But the drug activities at 1908 Bronxdale Avenue (see below) and the accompaniment of Vincent Papa doubtless could have induced the jury to think that some of this money was drug money; Pugliese had told Barnaba that Papa (whom Pugliese called "Uncle") supplied Inglese with heroin and had told Pannirello that DiNapoli was in partnership in the narcotics business with "Vinnie." It was stipulated to that this "Vinnie" was not appellant Vincent D'Amico; the jury might have inferred that it was Papa, an unidicted co-conspirator, since he was the one accompanying DiNapoli to 1908 Bronxdale Avenue where they picked up the $967,000 in cash.

the fellow who supplied him the narcotics had been arrested with a million dollars, a small amount of which was his (RS2656).[20]

3. DiNapoli's Defense

When cross-examined about his claim of having met DiNapoli in the house on Bronxdale Avenue, Pannirello could not say whether the house was detached or not (RS2554); could not identify DiNapoli's girlfriend (RS2554), nor say whether she was fat, slim or pregnant (RS2555). Pannirello was certain, however, that when he was in the apartment meeting DiNapoli, he could see the dining room from the living room (RS2557). Four witnesses testified for the defense, however, that it was impossible to see from the living room into the dining room, since they were completely divided by a solid wall. Photographs were introduced to corroborate the testimony (RS3270, 3999, 4007, 4122).

In an effort to minimize the prejudice of the million dollars after the District Court refused to suppress or reduce the quantum of money, the defense also called a witness DiBenedetto who testified that he worked for DiNapoli in the shylocking business (RS4123). He further testified that he and DiNapoli had plead guilty to a federal indictment charging them with shylocking and both had been sentenced on January 4th, 1973. DeBenedetto also testified that at the sentencing on the shylocking case, the Assistant United States Attorney had told

20. Pannirello was not asked about this story when he testified. Pannirello admitted, however, that he had told other lies to blow up his importance. For example, he told an undercover agent he had been in drugs for ten years, that he had made half a million dollars and had "stashed away $300,000", when in fact he was broke. All these stories were lies (RS2548).

the judge that DiNapoli was involved in shylocking "of some magnitude and . . . involved the implied and actual use of physical violence" (RS4124-4125). He added that it had been claimed by the Government on that occasion that DiNapoli's loan sharking involved "hundreds of thousands of dollars." Not once did the Government mention narcotics, despite the fact that the million dollars had been seized almost a year before (RS4126).

REASONS FOR GRANTING THE WRIT

Introduction

This petition raises important and substantial questions with regard to the application of the Fourth Amendment as it applies to the law of arrest, search and seizure and the due process clause of the Fifth Amendment.

The United States Court of Appeals for the Second Circuit expressed its reluctance to "lean over backward to blaze new pathways of individual responsibility in hard drug cases" (34a). The fact is that a distinguished panel of the Court of Appeals has practically erased by its decision and affirmance in this case the protection guaranteed by the Fourth Amendment. If this decision is permitted to prevail, police can virtually arrest and search at will any citizen who is seen in the company of a criminal suspect or lives in a questionable neighborhood. No decision cited by the Court of Appeals remotely tends to support the arrest, search and seizure of one million dollars in this case.

Moreover, the dramatic extension of the hearsay rule in this case and of the concept of verbal acts enunciated in *United*

States v. D'Amato, 493 F.2d 362 (2nd Cir. 1974), limits the protection of the due process guarantee. For the first time a conviction has been sustained on the testimony of an informer who while claiming never to have dealt or discussed drugs with DiNapoli claimed that he heard from others that DiNapoli was a source of heroin supply. The Court of Appeals in finding justification for the determination that DiNapoli was indeed part of the conspiracy charged in the indictment also sustained for the same reason his conviction on the substantive count thus evaporating the guidelines established in *United States v. Geaney*, 417 F.2d 1116 (2nd Cir. 1969).

Interestingly enough the Court's affirmance below amounted to a foray into the trial record in order to find some justification for the District Court's failure to grant DiNapoli Rule 29, F.R.C.P., application at the end of the Government's case. Furthermore, in concluding that DiNapoli was a member of the conspiracy to violate the Federal narcotic laws, the quantum of proof required in *Kotteakos v. United States*, 328 U.S. 750 (1946) was not applied and there existed in the record below insufficient proof that DiNapoli had knowledge of the conspiracy and joined it.

ARGUMENT

I.

THE ARREST OF DI NAPOLI WAS WITHOUT PROBABLE CAUSE AND THE SEARCH AND SEIZURE OF HIS SUITCASE WAS UNCONSTITUTIONAL.

Joseph DiNapoli, unknown to the police officers parked on the street outside his house, arrived home early in the evening of February 3, 1972, and carried a suitcase into his house.[21] He emerged forty-five minutes later, still carrying a suitcase. Because he was accompanied by a suspected narcotics violator, and virtually nothing more, he was arrested and the suitcase was searched. If the arrest and search were "reasonable," the Fourth Amendment has become a fiction.

Detective Spurdis, who signed the magistrate's complaint (RS66) and the affidavit for the subsequent search of 1908 Bronxdale Avenue as the arresting officer (RS67), and who received a citation for the arrest (RS337), testified that he alone made the decision to "hit the car" (RS235); it was an investigatory arrest and search (RS236), the arrest was "for nothing" (RS248), other than "to look into the suitcase" (RS247), and there was never a belief on his part that there was "probable cause" (RS284): He further stated (RS247):

> "There was no informant. There was no specific information. There was nothing observed, that is to say, no one was seen with a pistol or a glassine

21. DiNapoli lives at 1908 Bronxdale Avenue with Genevieve Patalano (R3254).

envelope or anything of that nature. If that's what you're trying to bring out, no, sir, there wasn't.

Q. Well, was a factor in your consideration the fact that Vincent Papa was known to your bureau or believed to be involved in narcotics transactions? Was that a factor? A. That was the only factor.

Q. And the second factor was the carrying of the suitcase; is that correct? A. Well, that would be secondary, because Mr. Papa, far as I could determine, did not bring the suitcase in the house, but it was just Mr. Papa's presence at the house that aroused my suspicions as a police officer as to what he was doing there."

Judge Duffy concluded that "John Spurdis is a liar." [22] Officer Reilly, however, who was called as a Government witness and whom Judge Duffy apparently believed, testified that officer Pallatroni directed the stopping and searching of the car before it even left 1908 Bronxdale Avenue (RS29). He frankly told the Court:

"Q. But as you got out of the car your immediate intent was to place Papa and DiNapoli under arrest? A. True, correct.

22. The Honorable Kevin Thomas presided at trial in the United States District Court for the Southern District of New York. In an opinion denying DiNapoli's motion to suppress he labeled Spurdis a liar.

Q. And then to make a search? A. Correct.

Q. Of that valise, is that correct? A. Correct.

Q. That was your intent? A. Correct.

Q. In other words, there was no vehicle infraction involved here of any kind, is that correct? A. No."

Officer Reed, Pallatroni's driving companion that night, admitted that DiNapoli and Papa were both under arrest and in handcuffs before the search of the car (RS408). When asked the reason for DiNapoli's arrest, he replied, "I don't know" (RS409). He later volunteered, "For violation of the federal narcotics law" (RS409). He further admitted that neither DiNapoli nor Papa had committed any crime prior to their arrest (RS412).

Officer Pallatroni, however, tried to save the search. His efforts were imaginative but flimsy and fanciful.

Pallatroni relied heavily upon Papa's reputation as a narcotics dealer. He said that Papa had a criminal record "dating back to 1938, that in the mid-50s he had been arrested . . . for violation of the federal narcotics laws, for which he was convicted" (RS96). Moreover, back in December, 1971, Pallatroni had arrested one Stanton Garland who expressed a desire to cooperate and told a story about two men who supplied him with heroin. He said that they were distributors for

Papa (RS99). Garland also claimed to have met Papa personally on two occasions (the dates of which were undisclosed), when they discussed drugs (RS100). As a result of Garland's cooperation, Papa and twenty other defendants had been indicted in January,1972, for narcotics violations in the Eastern District (RS100). Garland absconded, however, and was never seen again (RS134). He was also found in illegal possession of a gun while an informer (RS352). There was no claim by Pallatroni or anyone else that Garland was a reliable informer or that there was any serious basis for crediting him. Spurdis, on the other hand, swore without contradiction that Garland was not considered a reliable informant and was held in low esteem (RS 352). District Judge Duffy found as a fact that Garland has been "proved unreliable."

Even if Garland had been reliable, his information was too stale and too vague to furnish more than a general suspicion. *Wong Sun v. United States*, 371 U.S. 471 (1963); *Beck v. Ohio*, 379 U.S. 89 (1964); *Aguilar v. Texas*, 378 U.S. 108 (1964); *United States v. Bursey*, 5th Cir. 3/22/74, 15 Cr.L.R. 2087. It offered no basis whatsoever for concluding that Papa, shortly after being indicted on narcotics charges in the Eastern District, would be engaging in a narcotics transaction of February 3, 1972, at 1908 Bronxdale Avenue. To consider this information as warranting a conclusion that Papa was engaged in a narcotics transaction with DiNapoli, in DiNapoli's home, with three women and three men (one of whom, as will be noted, was an attorney) present, is quite simply to hold that anyone associating with a person under indictment for narcotics is open game for the police and may be arrested and searched at will. For all that the police officers knew, DiNapoli could have been Papa's

attorney, and the suitcase could have contained records relevant to Papa's defense. Had this been the case, there is no doubt that the officers would have been liable for an illegal arrest and search.[23] Yet it is elementary that an arrest cannot be justified by what a subsequent search discloses. *Johnson v. United States,* 333 U.S. 10 (1948); *Henry v. United States,* 361 U.S. 98 (1959).

A warrantless arrest or search is presumptively illegal. *Katz v. United States,* 389 U.S. 347, 357 (1967). This is equally true where the arrest is of occupants of an automobile. *Coolidge v. New Hampshire,* 403 U.S. 443 (1971). *Cf. Almeida-Sanchez v. United States,* 413 U.S. 266, 269 (1973) ("Automobile or no automobile, there must be probable cause . . . . ").

> "An arrest without a warrant bypasses the safeguards provided by an objective predetermination of probable cause, and substitutes instead the far less reliable procedure of an after-the-event justification for the arrest or search, too likely to be subtly influenced by the familiar shortcomings of hindsight judgment." *Beck v. Ohio,* 379 U.S. 89, 96 (1964).

That is precisely what happened here.

Pallatroni attempted to justify the arrest by stating that his suspicions drew some confirmation from the fact that a male left the apartment and drove off. He concluded that this was a

23. Spurdis testified that prior to the arrest he told his partner Reilly, "if that suitcase contained clothes or underwear or anything like that that wasn't illegal we were going to be in a lot of trouble" (RS314).

diversionary tactic since, "when a transaction is going to take place a lead car will go out . . . to take whatever surveillance officers might be there away from the area" (RS106). Had Pallatroni checked, however, he would have learned that the car was registered to Murray Richman, a New York attorney, who testified at the hearing that he was at 1908 Bronxdale visiting Jean Patalano and Vincent DiNapoli, who was to be sentenced on February 15th. He also discussed the purchase of a house with Joseph DiNapoli (RS190-193). He was manifestly not engaged in any diversionary tactics (RS194-195).[24]

The concept of probable cause obviously allows room for a police officer to make a mistake. But officer Pallatroni's inference about Murray Richman's car, if not an afterthought, contributed nothing to the existence of probable cause. Richman's leaving the premises was entirely innocuous, and Pallatroni's hunch about it was nothing more than a bootstrap affixed to his vague suspicions about Vincent Papa. The Court's observations in *Terry v. Ohio*, 392 U.S. 1 (1968), are apt:

> " . . . the police officer must be able to point to specific and articulable facts which, taken together with *rational* inferences from those facts, reasonably warrant that intrusion. The scheme of the Fourth Amendment becomes meaningful only when it is assured that at some point the conduct of those charged with enforcing the laws can be subjected to the more detached, neutral scrutiny of a judge . . . . And in making that assessment it is imperative that the facts be

24. The Government so conceded below (RS537).

> judged against an objective standard . . . . Anything less would invite intrusions upon constitutionally guaranteed rights based on nothing more substantial than inarticulate hunches . . . . If subjective good faith alone were the test, the protections of the Fourth Amendment would evaporate, and the people would be 'secure in their persons, houses, papers and effects,' only in the *discretion of the police.*" *Id.* at 22.

Papa's notoriety and reputation with the police officers could not properly be imputed to DiNapoli, so as to give probable cause to arrest him and search his suitcase. *United States v. Gonzales,* 362 F. Supp. 415 (S.D.N.Y. 1973). Likewise, "the reputation of an area [or a companion], although it may create suspicions about otherwise innocent activities, cannot furnish probable cause when the activities themselves are unexceptional." *Id.* at 421. *Cf. Sibron v. United States,* 392 U.S. 40 (1968); *Spinnelli v. United States,* 393 U.S. 410 (1969) ("police suspicion . . . may [not] be used to give additional weight to allegations that would otherwise be insufficient."); *United States v. DiRe,* 332 U.S. 581 (1948).

Pallatroni's suspicions were further fed by his belief that the car that Papa was driving was a rented car. Pallatroni "attached quite a bit of significance to that fact" because "individuals in narcotics and other areas of organized crime use leased cars in order to conceal their identity." (RS103). Even if the factual premise were correct — that Papa was driving a rented car — it surely would be the end of the Fourth Amendment to permit an

inference of criminal activity to be drawn against a person because he rides in a rented car. There was no data or other factual basis for crediting Pallatroni's notions about rented cars. For a Court to accept his assertions would be to abdicate its responsibility to determine probable cause from objective facts and reasonable inferences. *Sibron v. United States, supra; Terry v. Ohio, supra.* It is the duty of an Appellate Court, as much as that of the trial Court,

> "where necessary to the determination of constitutional rights, [to] make an independent examination of the facts, the findings, and the record [and] determine for itself whether . . . constitutional criteria . . . have been respected." *Ker v. California,* 374 U.S. 23, 34 (1963) (emphasis supplied).

Accord, *Beck v. Ohio, supra.*

Moreover, Pallatroni was not only wrong about Papa's car being a rented car, he was unreasonably if not willfully wrong. An employee of Wides Motor Sales testified at the suppression hearing that Mr. and Mrs. Papa had purchased a 1972 Pontiac from him, had brought it in for repairs, and had been given the 1968 Pontiac as a loaner (RS362-363). The car was owned by Wides Motor Sales — which was not in the leasing or renting business (RS364) — and not by Wide World Leasing Corporation, as reported by Pallatroni (RS182).

Pallatroni should have doubted that a four year old automobile was a rental car. He should have *known* it was not a

rental car when he saw that it had dealer plates (RS50, 180) and did not have the Zs or Ys required of rental cars by New York law (RS183). The rented car therefore vanishes as a component of probable cause.[25]

Pallatroni could think of nothing else of significance to justify his arrest and search of DiNapoli.[26] The Government intimated that the officers may have suspected that DiNapoli was the John Doe they were looking for (RS525, 528) but the evidence was conclusively against this claim. Spurdis testified that he would "most certainly" recognize the John Doe if he saw him, and DiNapoli was "most definitely not" John Doe (RS215). Pallatroni moreover, was not thinking about John Doe when he ordered the arrest (RS154).

A. Post-arrest Suspicions

While in conflict over who decided to effect the arrest (RS108, 234), who actually effected it (RS29, 239), and precisely when the decision was made, the officers were unanimous in their testimony that a decision was reached to arrest Papa and DiNapoli when or shortly after they reentered the Pontiac.[27]

25. The Government conceded below that the Pontiac was not in fact a rented car (RS526, 537).

26. Pallatroni thought it was unusual for Papa to be in the Bronx rather than Queens (RS156), but surely this needs no comment.

27. Spurdis, who claimed he made the decision to arrest, indicated that he made the decision before Papa and DiNapoli even got into the car (RS314-317). Reilly indicated that Pallatroni's order to "take the car" occurred while the Pontiac was moving (RS80) but that he had previously been instructed "to take them out of the area and place them under arrest" (RS29). Pallatroni claimed that he gave the order when the car reached Bronxdale and Tremont Avenues (RS108). Reed said the order was given near the intersection of Castle Hill and East Tremont (RS406).

There was nothing furtive or unusual about the manner in which the automobile was operated which contributed to the decision to make the arrest. The arrest was effected when the officer, whichever one it was, Reilly or Spurdis, flashed his badge and his gun and ordered Papa to stop. At that point, Papa's freedom of movement was curtailed and the arrest was complete. *Henry v. United States,* 361 U.S. 98 (1959); *Taylor v. Arizona,* 471 F.2d 848 (9th Cir. 1972); *United States v. Gonzales,* 362 F. Supp. 415 (S.D.N.Y. 1973). If the arrest was without probable cause, the subsequent search was unlawful, *Henry v. United States, supra; Beck v. Ohio, supra; Wong Sun v. United States,* 371 U.S. 471 (1963). It is therefore immaterial to the validity of the arrest that the arrestees may have acted suspiciously as the arrest was being effected, for to permit post-arrest conduct to contribute to probable cause is to justify an illegal arrest by its fruits. *Cf. Wong Sun v. United States, supra.* Pallatroni's claim that Papa acted suspiciously because he got of the car after being arrested is therefore irrelevant. Apart from being irrelevant, however, it is ludicrous. Pallatroni said that when Papa got out of his car and walked back to the police car, "it was a very sharp move," indicating Papa wanted to divert attention from the car (RS109-110). Pallatroni generalized that, "when a police officer stops a car most people sit in the car and wait for the police officer to go to the car, ask for a license or whatever business there is to conduct" (RS110). Even if this dubious proposition is true, it is simply absurd to infer criminality from the fact than an arrestee gets out of his car and walks back to the police vehicle. Indeed, the Supreme Court, in *Adams v. Williams,* 407 U.S. 143 (1972), attached significance to the fact that the driver did *not* get out of the car when accosted by a police officer, as a justification for searching his person. Furthermore, since DiNapoli remained in

the car, Papa's actions could hardly have been calculated to keep the police away from it.

Probable cause exists where the facts and circumstances within the arresting officer's knowledge and of which they have reasonably trustworthy information are sufficient in themselves to warrant a man of reasonable caution to believe that an offense has been or is being committed. *Draper v. United States,* 358 U.S. 307 (1959). Nothing remotely approaching that existed in this case. *Cf. Gonzales v. United States, supra; Henry v. United States, supra; Beck v. Ohio, supra.*

B. The Opinion Of The Court Of Appeals

The thrust of the opinion of the Court of Appeals in justifying Pallatroni's arrest, search and seizure under the Fourth Amendment found probable cause because of the belief that 1908 Bronxdale Avenue was a suspicious address linked to narcotics traffic (19a); Vincent Papa was a well-known narcotics violator (20a); the use by Papa of an alleged leased or rental car was significant in that it was an effort to avoid detection (22a); attorney Richmond's car drove in a circular route thus creating in Pallatroni the belief that its task was to take heat off the surveillance (24a); and a light suitcase went into 1908 Bronxdale Avenue believed carried by Papa and a heavier suitcase came out (25a).

Detective Spurdis and Patrolman Reilly's trip to 1908 Bronxdale Avenue was very much like a last resort. 1908 Bronxdale was not a narcotics haven and it had never been associated with narcotics activities. At most the Court's opinion

relies on the facts that because one Facchiano, believed involved in narcotics but not even named as a conspirator in this case, was observed outside the Cottage Inn in conversation with someone seated in a car registered to a person at 1908 Bronxdale and that four months prior to the arrest, search and seizure a Joseph DiBenedetto, an owner of the Cottage Inn, was arrested exiting 1908 Bronxdale Avenue for Grand Larceny automobile. 1908 Bronxdale was suspicious. The Government never even attempted to demonstrate that either Papa or DiNapoli knew Facchiano or were linked to him in any way.

Clearly, the fact that Papa was known to Pallatroni as a narcotics violator alone would be insufficient to justify a search of Papa, much less DiNapoli. The communication from other arresting officers received by Pallatroni, who was not at the scene, was that Papa was carrying a suitcase into 1908 Bronxdale, a residence in which the officers knew Papa did not reside. Pallatroni felt suspicious that Papa known to reside in Queens was at 1908 Bronxdale. He was a figure unfamiliar to the area according to Pallatroni. It was Papa that was the target and the subject of Pallatroni's attention.

Assuming arguendo that the agents had good ground to suspect Vincent Papa of being a major narcotics violator, it violates common sense for the Government to assert that the agents therefore had "ample reason to believe" that the house in which DiNapoli (whom they didn't even know) lived "was being used in connection with the sale and distribution of narcotics" (GB65) or that "a major narcotics transaction was about to take place" (*Ibid.*). There was virtually nothing except Papa's reputation to warrant even suspicion "that a transfer of narcotics

was taking place within their sight" (GB67). *United States v. Chaplin,* 427 F.2d 14 (2d Cir. 1970), upon which reliance is placed, is clearly distinguishable. There, agents observed a series of clandestine meetings between defendant and other narcotics suspects, including the transfer of money followed by a bulge in defendant's coat. Incriminating conversations were even overheard. There were none here, and nothing in Papa or DiNapoli's behavior was clandestine or secretive. Similarly, in *United States v. Wabnik,* 444 F.2d 203 (2d Cir. 1971), the transfer of stolen property observed by the officers occurred under circumstances making "it difficult to imagine an innocent explanation for the activity" *Id.* at 205. Here, DiNapoli could have been about to embark on a trip, taking some records to his lawyer or any number of things innocent people do with suitcases. To hold that the presence of Papa created probable cause that Papa's companion was then and there engaged in criminal activity would be ludicrous were it not so frightening an assault on freedom. Fortunately, the Supreme Court long ago labelled such guilt by association "farfetched" even where, as there, the defendant was in an automobile, in the company of another who had rendezvoused for the known, specific purpose of committing a crime. "Presumptions of guilt are not lightly to be indulged from mere meetings." *United States v. Di Re,* 332 U.S. 581, 593 (1948). Accord, *United States v. Gonzales,* 362 F. Supp. 415 (SDNY 1973); *Sibron v. New York,* 392 U.S. 40 (1968).

Furthermore, the agents misinformed their Group Supervisor Pallatroni for it was DiNapoli, not Papa, going into his own home with a seemingly light suitcase in his hand. The Court called attention to the extensive surveillances at the

Cottage Inn and 1908 Bronxdale Avenue and yet none of the law enforcement officers involved knew or even could recognize the principal resident of 1908 Bronxdale, Joseph DiNapoli. While reasonable error committed by the officers in assessing whether to effect an arrest and search can amount to probable cause given specific information the absence of reliable information cannot elevate absolutely erroneous or non-existent information within one of the exceptions to the Fourth Amendment. Pallatroni was erroneously told by his own men that it was Papa carrying a suitcase into an address unusual to him. Pallatroni acted on this information. The officers on scene admitted at the hearing their mistake although they perpetuated it in their intelligence reports. The Court nevertheless found reasonable Pallatroni's reliance on the misinformation given to him by his own officers. The truth was that it was DiNapoli at his own residence with his own suitcase — a very usual and common sight anywhere in the world.

The car driven by Papa was neither leased nor rented. Pallatroni was carried away with Papa's unexpected presence at the scene and at best confused as to the fact that Papa was driving a car with dealer's plates. Having received wrong information from his surveillance team as to Papa carrying the suitcase, he now claimed that he received wrong information from communications to the effect that Papa was now driving a rented car. The fact was that Papa was driving a Pontiac with dealer's plates because his own automobile was undergoing repairs.

Now acting upon a well of misinformation provided by police officers which in the Court's opinion was worthy of

elevation to a Fourth Amendment exception, Pallatroni decided to participate personally in the surveillance at 1908 Bronxdale Avenue. Attorney Richmond left 1908 Bronxdale at night and in the heavy rain. He had the misfortune of making a wrong turn. Pallatroni promptly claimed that this created the impression that attorney Richmond's objective was to take the heat off the surveillance. The Government never contended other than an honest mistake both by Richmond as to his own driving and Pallatroni as to the conclusion drawn. The Court, nevertheless, found still another element of reasonableness in this comedy of errors thus avoiding the sanction of the Fourth Amendment.

Pallatroni claimed to have made the decision to stop the Pontiac and arrest the occupants DiNapoli and Papa. He did so not on what he had seen but on what officers under him erroneously observed. Had Pallatroni been correctly advised that DiNapoli was going into his own house with a suitcase and left thereafter with a heavier one, even in the company of Papa, that attorney Richmond made a wrong turn by mistake and knew nothing of a surveillance, and that Papa was not in a rented or leased car, it seems reasonable that Pallatroni would not have made the decision to *hit the car.* One's own observations may lead to erroneous interpretations but here police officers through misinformation attempt to elevate a fact situation which is figment to probable cause.

II.

IT WAS PREJUDICIAL ERROR TO ADMIT EVIDENCE THAT DI NAPOLI WAS ARRESTED WITH VINCENT PAPA ON FEBRUARY 3, 1972, IN POSSESSION OF NEARLY A MILLION DOLLARS IN CASH AND IN THE ALTERNATIVE NOT TO MINIMIZE THE AMOUNT SEIZED.

After extended objection and argument by many counsel (R3416-3422, R3554-3560, R3563-3564), Judge Duffy ruled admissible testimony about the million dollar seizure (R3603). Seventy-two pages of testimony were then elicited from officers Reilly and Pallatroni concerning the events on February 3, 1972, and the discovery of the million dollars in DiNapoli's suitcase (R3608-3676). The Court also admitted into evidence over objection the suitcase (R3625) and a photograph of the money (R3657-3658).

The principal theory upon which the Government apparently predicated admissibility of the sensational evidence was that the possession by DiNapoli of almost a million dollars on February 3, 1972, corroborated Pannirello's testimony that Pugliese gave DiNapoli eight or ten thousand dollars in June, 1971, eight months before, and the Government's *claim* that Dilacio bought a kilo of heroin from DiNapoli for $22,000 in late November or early December, 1971 (R2175). Had DiNapoli somehow claimed to be a pauper, or had the Government shown that he lacked significant wealth prior to these events, his proximity to a million dollars several months later might have some *tenuous* relevancy. Evidence of a sudden acquisition of

wealth at or about the time of an alleged acquisitive crime is concededly probative of that crime. See *United States v. Trudo*, 449 F.2d 649 (2d Cir. 1971); *United States v. Ravich*, 421 F.2d 1196 (2d Cir. 1970); 1 Wharton's Criminal Evidence §212, p. 443; §213, p. 446-48 (13 ed. 1972); 1 Wigmore §154, p. 601 (3d ed. 1940). Similarly, if the actual bills allegedly received in the crime, or even the same denominations, were subsequently found in a defendant's possession, there is a nexus which warrants admissibility. It is otherwise, however, if the defendant is merely found in possession of a quantity of money corresponding in amount to the fruits of the crime, for "the hypothesis that the money found is the money taken is too forced and extraordinary to be receivable." 1 Wigmore, *supra*, at 601.

Here, there was neither claim nor evidence by the defense that DiNapoli lacked the means to participate in the crimes charged. Neither was there claim or evidence offered by the Government of any change in DiNapoli's financial position during the period in question. The probative value of the million dollars was therefore so strained and vaporous as to be virtually non-existent. See *United States v. Williams*, 168 U.S. 382 (1897); *Neal v. United States*, 102 F.2d 643 (8th Cir. 1939).

This is plainly not a case like *United States v. Tirinkian*, 488 F.2d 873 (2d Cir. 1973), where the sum of $146,000 was found in the possession of an accessory on the very day customs officials discovered a shipment of 286 pounds of hashish and the accessory was about to embark to Bierut. There, the money was brigaded in time and circumstance to both the illegal shipments and the flight. The prejudice was also minimized by the fact that

the money was not found in the defendant's possession. Furthermore, the sum was about one-seventh that involved in this case.

Neither is it a case like *United States v. Dono*, 428 F.2d 204 (2d Cir. 1970), where the sum of money about which testimony was introduced ($1978) was so small as to make the risk of prejudice negligible.

In the present case, the introduction of testimony about the million dollars was the virtual equivalent of character evidence. What the Supreme Court said about the sum of $5000 is applicable, with proportionate magnification, to a million:

> "The manifest object and the necessary effect of this evidence was merely to give color to the present charges, and to cause the jury to believe that the accused had in his possession more money than a man in his condition could have obtained by honest methods." *Williams v. United States*, 168 U.S. 382, 396 (1897).

This evidence inevitably stamped DiNapoli as a major criminal. Its relevance was less and its prejudicial effect far greater than the suitcase admitted in *United States v. Falley*, 489 F.2d 33 (2d Cir. 1973). There, to corroborate its witness, who testified to a hashish smuggling conspiracy with the defendants, the Government offered into evidence a suitcase containing five kilos of hashish, some heroin, and narcotics paraphernalia which had been seized from the witness during the period of the alleged conspiracy, but which he said was not part of the conspiracy.

There, as here, the principal purpose of the evidence was to corroborate the witness, this Court, through Judge Moore, reversed:

> "Although the suitcase and its contents . . . were relevant to brand [the witness] as a smuggler and supported the court's credibility theory to this extent, this relevance was outweighed by the prejudice which might have been engendered in the minds of the jury . . . . " *Id.* at 37.

In *Falley*, though not here, cautionary instructions were given concerning the limited relevance of the suitcase and its contents. Still, the Court said:

> "Under the circumstances, the court could not, with a mere verbal instruction, undo the sensation created by the introduction of this large quantity of illegal drugs into the courtroom. The prejudice, unfairly enlisted, would have undoubtedly continued to color the proceedings to defendants' prejudice." *Id.* at 38.

It can scarcely be suggested that five kilos of hashish and a small quantity of heroin found in possession of the Government *witness* created a greater "sensation" or a likelihood of more prejudice than a *million dollars* found in possession *of the defendant*. Nor could its "color [on] the proceedings to defendant's prejudice" have conceivably exceeded that of the million dollars.

The Government's offer of this evidence was evidently an afterthought, as it is not included as an overt act in the indictment.[28] Here, as in *Falley*, "The fact that the [evidence] could be peripherally related to the proceedings is more of an *ex post facto* rationization of the prosecution's behavior than an accurate description of its motivation." *Id.* at 37.

Proof of DiNapoli's possession of a million dollars on February 3, 1972, was not only damning character evidence, it was nothing more nor less than proof of an unrelated crime. The possibility that the million dollars was innocently acquired was remote at best. Its possession was therefore cogent evidence of some unknown crime at some time. Yet this evidence came within none of the well-recognized exceptions to the prohibition against other crimes evidence *i.e.*, as proof of intent, knowledge, motive, identity, or common scheme or plan. See *United States v. Byrd*, 352 F.2d 570 (2d Cir. 1965); *Spencer v. Texas*, 385 U.S. 554, 560-2 (1967); *Parker v. United States*, 400 F.2d 248, 251-1 (9th Cir. 1968). Occurring as it did approximately two months after DiNapoli, according to the Government's hearsay evidence, refused to participate in heroin transactions (R2128), and itself having no connection with a heroin transaction, the million dollar seizure was patently inadmissible as other crimes evidence. The possession by DiNapoli of *any* sum of money in

28. Apparently, there are grand plans for the million dollar evidence. In another indictment filed subsequent to the verdict in the present case by the United States Attorney for the Southern District against Papa and others (74 Cir. 251), the million dollar seizure is specified as an overt act. New York's Special Prosecutor Maurice Nadjari has filed yet another indictment against Papa and former New York City Detective Frank King, for harboring fugitives (New York County Supreme Court, Indictment No. 2546 74), in which the million dollars is employed on still another theory.

February, 1972, would be inadmissible; possession of a million dollars was unquestionably a matter about which the jury should not have heard.

The million dollar story also quite unfairly undermined the defendant's right not to testify. Confronted with the highly inflammatory evidence, having no relation to the present charge, he was forced to offer damaging evidence that he was in the shylocking business. He did this in cross-examining Pallatroni (R3672-3673), and then by calling his own witness, who not only testified that DiNapoli was a shylock (R4123) whose business was "very, very big" (R4125), but revealed that DiNapoli had even plead guilty to a federal charge of shylocking and was sentenced on Jaunary 4, 1973, to three years in prison (R4124).[29] As counsel explained prior to offering this evidence, "I am obliged to put this witness on very reluctantly, but the . . . million dollars gives me no other choice (R4117-4118). That this would be a necessary consequence of admitting the million dollars was made known to the Court in trial memoranda[30] and in colloquies prior to receipt of the evidence (R3421, R3558-3560).

The purpose and effect of this evidence was not unlike that present in a homicide case reviewed, and reversed, by Judge Cardozo, in *People v. Zackowitz*, 254 N.Y. 192, 172 N.E. 466 (1930):

29. DiNapoli was even compelled to elicit evidence that his shylocking activities "involved the implied and actual use of physical violence" (R4125).

30. See DiNapoli's trial memorandum and supplemental trial memorandum.

> "The endeavor was to generate an atmosphere of professional criminality . . . . There is nothing stronger than mere suspicion to guide us to an answer. Whether the explanation be false or true, he should not have been driven by the People to the necessity of offering it. Brought to answer a specific charge, and to defend himself against it, he was placed in a position where he had to defend himself against another, more general and sweeping. He was made to answer to the charge, pervasive and poisonous even if insidious and covert, that he was a man . . . of criminal disposition." 254 N.Y. at 198; 172 N.E. at 468.

DiNapoli, moreover, was *unable* to answer the charge that he was a man of criminal disposition. He was forced by the inflammatory evidence of the million dollars to *admit* that he was precisely that. Such was patently the hope and purpose of the prosecution.

In *Shepard v. United States*, 290 U.S. 96, 104 (1933), Justice Cardozo said:

> "It is for ordinary minds, and not for psychoanalysts, that our rules of evidence are framed. They have their source very often in considerations of administrative convenience, of practical expediency, and not in rules of logic. When the risk of confusion is so great as to upset the balance of advantage, the evidence goes out."

In *United States v. Krulewitch,* 145 F.2d 76 (2d Cir. 1944), Judge Hand said:

> " . . . The competence of evidence in the end depends upon whether it is likely, all things considered, to advance a search for the truth; and that does not inevitably follow from the fact that it is rationally relevant. As has been said over and over again, the question is always whether what it will contribute rationally to a solution is more than matched by its possibilities of confusion and surprise, by the length of time and the expense it will involve, and by the chance that it will divert the jury from the facts which should control their verdict. Wigmore §§39(2), 42. . . . " *Id.* at 80.

Under either of these tests, the million dollar story should never have been told. *Cf. Blumberg v. United States,* 222 F.2d 496, 500 (5th Cir. 1955); *United States v. Tomaiolo,* 249 F.2d 683, 690 (2d Cir. 1957). This evidence had three of the counterweights, each of which is ordinarily sufficient to require exclusion of marginally relevant evidence: danger of prejudice,[31] probability that proof and response will confuse and distract, and likelihood of undue time consumption. See, McCormick, Evidence 439 (2d ed. 1972). Where, as here, there were thirty-three indicted defendants, thirty-five unindicted co-conspirators, eighteen defendants on trial, thirty counts in the indictment, and more than sixty witnesses, it was difficult enough, if not

31. It is not without significance that included in the testimony about the million dollars was the fact that four narcotics detectives *arrested* DiNapoli (R3616). This invited speculation that the officers had information that he was guilty of narcotics violations.

impossible, for the jury to comprehend, sift and sort the probative evidence, and imperative that it not be prejudiced, confused, and poisoned by the million dollar episode and its sequela. Since the existence of the counterweights was made plain to the trial judge, it was a clear abuse of discretion for him to have admitted the evidence.[32]

A. The Relevance Of The Million Dollars

In support of its claim that the seizure of the million dollars was admissible, the Government urges that Papa, DiNapoli's companion, was the source of all the narcotics involved in the conspiracy. The evidence supports no such claim. Even if it did, however, the evidence of the million dollars had only the most peripheral and speculative relationship to the conspiracy.

The Government's argument that the money is analogous to the possession of special tools or implements needed for a crime is inapt. First, while money may be needed to deal in narcotics, there is nothing special or unique about it — any money will do. Second, possession of implements or tools uniquely suited to the crime has significant probative value only if closely related in time to the commission of the crime. *Cf.* 1 Wigmore, Evidence §88, p. 516 (3d ed. 1940). Here, the temporal

32. While we contend with all available vigor that the entire episode at 1908 Bronxdale Avenue was inadmissible, there was an obvious alternative available to the Government and the Court. They could have accepted the suggestion implicit in the arguments of Mr. Fisher (26:3419) and Mrs. Rosner (27:3554) that the Government could accomplish its avowed and only plausibly legitmate objective by a restricted offer, *e.g.*, that DiNapoli was in possession of a "substantial sum of cash" or "in excess of ten thousand dollars." It would surely have been within the court's discretion to order the Government to instruct its witnesses to so testify.

connection was tenuous and remote, being two or three months *after* DiNapoli was said to be about to sell a kilo for $22,000.

The Government's claim that some of the money found on February 3, 1972, was "directly traceable to narcotics transactions proved at trial" is preposterous. The only money DiNapoli was shown at trial to have received was eight to ten thousand dollars, some six weeks before, and that money was not shown to have been part of a narcotics transaction.

The Government's heavy reliance upon *United States v. Jackskion,* 102 F.2d 683, 684 (2d Cir. 1939), is misplaced. That case merely upheld the admissibility of "the sudden acquisition of wealth," *Id.* at 684, and is in no way inconsistent with *Williams v. United States,* 168 U.S. 382 (1897), or the position urged by appellant. The Government has cited no case in which evidence of the possession of money was *either* as remote to issues on trial *or* as prejudicial as the million dollars here admitted.

The fact that only a photograph of the almost million dollars was shown to the jury instead of the actual money detracts little if anything from its impact at trial. A sigh of disbelief emanated from the jury when the Government alluded to the seizure for the first time in its opening statement. The overflow of prejudicial effect balanced against its probative value made it impossible for DiNapoli to receive a fair trial and furthermore obliged him to submit into the record a felony conviction based upon extortion and shylocking to the jury without even testifying in an effort to explain and mitigate the prejudicial imbalance of the money. Moreover, the receipt of the

money cloaked DiNapoli with assorted professional criminality not germane to the issues of the case.

The point is well-made by the Court that "the $960,000 could also be taken *to be at least in substantial part* narcotics proceeds" (36a; emp. added). But the jury had no business speculating on such a matter. Despite defense requests, the trial court made no effort whatsoever to limit testimony about the amount of money seized from DiNapoli to an amount consistent with the issue raised by the indictment. At the then going rate of $21,000 per kilo an amount well-under $100,000 was at the very minimum appropriate. The District Court denied all applications to minimize the prejudicial impact of the seizure and reduce it to an amount consistent with the proof. In *Williams v. United States*, 168 U.S. 382 (1897) a conviction was reversed on similar grounds. Furthermore, there was neither proof nor claim by the Government of a sudden acquisition of wealth. By reducing the amount as requested by the defense, it would not have been necessary for DiNapoli to have informed the jury that he was a convicted felon, and the prejudicial impact of the testimony would have been within tolerable bonds.

III.

THE EVIDENCE AGAINST DI NAPOLI WAS INSUFFICIENT TO CONVICT ON EITHER THE CONSPIRACY OR THE SUBSTANTIVE COUNT.

A. The Conspiracy

Before statements of alleged co-conspirators can be considered against a defendant, the prosecution must prove by

the defendant's own act, deeds, or other competent evidence, his participation in the conspiracy. *Glasser v. United States,* 315 U.S. 60, 74 (1942); *United States v. Geaney,* 417 F.2d 1116 (2d Cir. 1969). Such evidence must prove his membership in the conspiracy "by a fair preponderance of the evidence independent of the hearsay utterances," *United States v. Geaney, supra,* or to a level high "enough to take the question to the jury." *United States v. Nixon,* 42 LW 5237, 5243, n. 14 (July 24, 1974). Where, as here, there was timely objection and motion to strike the hearsay,[33] and it is determined on appeal that the defendant's participation was not independently proved, a conviction should be reversed with directions to acquit. *United States v. Fantuzzi,* 463 F.2d 683, 691 (2d Cir. 1972). In "assessing the evidence of the existence of a conspiracy and each defendant's connection with it, hearsay statements of other alleged co-conspirators, (including co-defendants) must be excluded from consideration." *United States v. DeCavalcante,* 440 F.2d 1273 (3d Cir. 1971).

When the hearsay concerning DiNapoli is stripped away, nothing remains. DiNapoli was never present when a narcotics transaction took place, never present when anybody said anything about narcotics, "goods," "shirts," or any other euphemisms; and he never said or did anything about narcotics. DiNapoli was seen by Government witnesses on only two arguably significant occasions: In June, 1971, when Pannirello claimed to have accompanied Pugliese to 1908 Bronxdale where Pugliese handed DiNapoli eight or ten thousand dollars

33. Before trial, defendants were granted a standing objection to hearsay admitted subject to connection on the conspiracy (R5446; R5459-60), and an omnibus motion to strike such hearsay was made and denied (R4494). Also, at the close of the Government's case, the Court said "I assume that you make all the motions . . . . " (R3680).

(R2132), and on February 3, 1972, when four police officers arrested him in possession of the million dollars (R3605-3676). By no stretch of fancy can this be thought to constitute proof by "a fair preponderance" or "enough to take the question to the jury" of DiNapoli's participation in the conspiracy charged. It is *at least* as consistent with the uncontradicted evidence that DiNapoli was a shylock (R3672, R4123), for which offense he has already been convicted (R4124), as it is with his participation in *any* criminal conspiracy, and it plainly does not place him in the heroin conspiracy charged below. There wasn't even any hearsay introduced concerning the purpose of Pugliese in giving DiNapoli the money in June, 1971, and Pannirello's admissions that he never discussed drugs with DiNapoli nor heard DiNapoli discuss drugs (R2548-2549) reduces the cogency of that evidence to the vanishing point. The trial court should have stricken the hearsay and granted a judgment of acquittal. *Cf. United States v. Freeman*, 2d Cir. June 7, 1974 (Slip op. #1050).

The evidence in support of count 21, which was not submitted to the jury under the *Pinkerton* doctrine *(Pinkerton v. United States*, 328 U.S. 640 (1946)), was insufficient to permit an inference of guilt beyond a reasonable doubt, *United States v. Taylor*, 464 F.2d 240 (2d Cir. 1972), even if all the hearsay concerning it is given all the weight it can carry.[34] According to Pannirello, Pugliese in October, 1971, said that "Dilacio was going to pick up from Joseph DiNapoli and [Pannirello] was to make the deliveries" (R2158). After Pugliese went to jail, in late November or early December, 1971 (R2174), Dilacio told

34. It was, of course, inadmissible and should have been stricken if our argument above is correct.

Pannirello that he had called DiNapoli and that DiNapoli "was going to give him a kilo" for $22,000 (R2175). Dilacio also told Pannirello that he was going to pick up the kilo and take it to Gamba, the stash (R2175). Sometime thereafter, still in late November or early December, Pannirello went to Gamba's, picked up two packages which Gamba said was a kilo (R2177), and sold it (R2178). Whether the kilo which Pannirello picked up from Gamba had actually been acquired from DiNapoli is left to conjecture. There isn't even evidence that Dilacio *said* he had gotten the kilo from DiNapoli. The conjecture is considerably undercut, moreover, by Pannirello's admissions on cross-examination that this transaction could have occurred as late as January 15, 1972 (R2568), whereas Pannirello had truthfully told agent Nolan that after Pugliese went to jail, Dilacio was never able to get drugs from DiNapoli (R2569-2579). The speculation becomes even more shaky when it is noted that, prior to Pannirello's picking up the kilo from Gamba, Gamba had been used as a stash by Pugliese (R2175-2176). Furthermore, there isn't even hearsay evidence that anybody ever paid DiNapoli anything. Thus, even if there had been sufficient evidence to convict DiNapoli on the conspiracy count, there was not enough independent *and* hearsay evidence to convict him on count 21.

Although we must accept the view of the evidence most favorable to the Goverment for purposes of appeal, it is also true that as a matter of law it was incumbent upon the prosecution to demonstrate at trial that DiNapoli's participation in the conspiracy was established within the guidelines of *United States v. Geaney, supra; United States v. D'Amato, supra.* The Court of Appeals held that Pugliese's delivery of $8,000 or $10,000 to

DiNapoli for an unspecified purpose was proof of DiNapoli's membership in the conspiracy, even though Pannirello did not know by hearing or otherwise if DiNapoli was engaged in narcotics activity. The money was paid precisely at a period when DiNapoli was involved in loan sharking according to the Government. The fact that DiNapoli failed to count the money in Pugliese's presence does not prove that Pugliese was an underling, delivering to his boss, since even in such a relationship a count would be appropriate. Moreover, it wholly fails to show a narcotis relationship.

The Court points out that a narcotics relationship need not have been drawn by the jury but could have been (36a). The quantum of legal proof necessary to establish DiNapoli's participation in the conspiracy was not met by inferences from *neutral facts*, but an actual showing by the Government that DiNapoli knowingly knew of the objectives of the narcotics conspiracy and willingly joined it. The fact that DiNapoli was at one time arrested with $967,450, does not raise the level of the proof to anything other than speculation. Pannirello's assertion that he never witnessed a narcotics transaction in his presence involving DiNapoli places the delivery of $8,000 or $10,000 in its proper prospective. These statements in conjunction with the Pannirello assertion "DiLacio picked up the kilo from DiNapoli" was within the realm of hearsay and therefore within the standing hearsay objection and the motion to strike preserved at trial. Only a reading out of context permits the conclusion that Pannirello's assertion could be taken "as fact found by the jury" (38a).

The direct proof absent hearsay adduced against DiNapoli pales by comparison with that offered against Alonzo in this

case. Although Pannirello could not testify against DiNapoli as either having dealt in or being observed in any narcotics activity, he did testify to a direct sale of drugs to Alonzo, who had admitted being a dealer previously, in order to permit him to "get rolling again." Whereas the Court's opinion called attention to the fact that Pugliese associated with DiNapoli "at 1908 Bronxdale and at the Beach Rose Social Club," confirming the likelihood of the established business relationship, the Court of Appeals viewed Alonzo's presence at an apartment when Pannirello made a delivery of drugs to Hansen as innocuous indicating that presence alone was not enough. *United States v. Terrell,* 474 F.2d 872 (2nd Cir. 1973) (44a). Alonzo thus received the benefit, and rightfully so, of the single transaction line of cases. Interestingly, Alonzo, who was linked by direct proof to narcotics activity by Pannirello's dealings with him escapes his conviction, while DiNapoli's twenty year sentence is affirmed on what Pannirello allegedly heard from others.

Furthermore, the Government is plainly in error in suggesting it need establish only "a likelihood of an illicit association between the declarant and the defendant . . ." in order to warrant a disregard of the hearsay rule. *United States v. Ragland,* 375 F.2d 471, 477 (2d Cir. 1967), which the Government cites for this proposition (GB48) stands for no such thing. In context it is clear that the Court in *Ragland,* in referring to an "illicit association" meant a "conspiracy, agency, or concert of action," *Id.* at 476, which must be proved before hearsay can be relied upon. As *United States v. Geaney,* 417 F.2d 1116, 1120 (2d Cir. 1969) makes clear, the prosecution must prove "participation in the conspiracy . . . by a fair preponderance of the evidence independent of the hearsay

utterances." While even this test may be somewhat vague, it seems the same as the civil standard, *i.e.*, the balance of probabilities. The Supreme Court recently delivered a dictum that the test of admissibility is even higher, *i.e.*, "enough to take the question to the jury." *United States v. Nixon*, 42 L.W. 5237, 5243, n. 14 (July 24, 1974). While it seems clear that the Government here plainly failed to meet either the *Geaney* or the *Nixon* test, appellant urges adoption of the latter. As the Court noted in *Geaney*, such a high standard "would not make the receipt of [hearsay] valueless to the prosecution. Although proof *aliunde* may suffice for submission to the jury, the jury might not be convinced by it and the utterances might tip the scale." 417 F.2d at 1119-20.

In any event, the Government's proof falls well below that required by *Geaney*. The Government points to four items of evidence which it claims establishes DiNapoli's participation in the conspiracy *aliunde* the hearsay (GB49):

1. Pugliese, who was Pannirello's partner in narcotics, once took Pannirello with him to DiNapoli's house, where Pugliese, for no explained reason, gave DiNapoli eight to ten thousand dollars in cash (R2131-2132). Relying upon *United States v. Mallah*, Dkt. No. 74-1327 (2d Cir. September 23, 1974), Slip op. at 5478, the Government claims this was substantial evidence of DiNapoli's membership in the conspiracy because Pugliese, at the time he delivered the money, was engaged in narcotics activities. In *Mallah*, however, the payment of large sums of money, *proven to have come from a narcotics transaction*, was connected with several incriminating conversations which established that the purpose of the payment was to share profits

from narcotics activities. Indeed, one of those incriminating conversations with the defendant occurred *in the presence of a pile of packages of white powder,* at which time Mallah said, "Are you going to have enough money for this?" *Id.* at 5478. Here, there is no suggestion whatever that the money was a share in a narcotics operation. On the contrary, it was the Government's claim in another indictment, to which DiNapoli pled guilty, that DiNapoli, during the period in question, was engaged in the shylocking business on a large scale (R4121-4126, R4118-4125). It is sheer speculation to surmise that the payment of eight to ten thousand dollars was a sharing of narcotics proceeds rather than payment of a debt or delivery of money for some other purpose.

2. DiNapoli visited the Beach Rose Social Club and was photographed standing outside the club with Tutino. Since there was no evidence that the Club was anything other than its name implies, DiNapoli's mere *presence* there is of no weight.

3. Pugliese and Mamone visited DiNapoli, at some unspecified time, in DiNapoli's Bronxdale Avenue home. Mere association, however, is not evidence of a criminal conspiracy. *United States v. Di Re,* 159 F.2d 818 (2d Cir. 1947), *aff'd.,* 332 U.S. 581 (1948); *United States v. Gonzales,* 362 F. Supp. 415 (S.D.N.Y. 1973).

4. The "most compelling item of non-hearsay," says the Government (GB50), was DiNapoli's arrest, in February 1972, in possession of nearly a million dollars. Yet this money not only never was connected to the conspiracy proved below, it has never been connected with *drugs.* Precisely because the money

cannot be traced to or otherwise connected to any specific crime or conspiracy, the Government apparently intends to throw it into a number of indictments. In *United States v. Papa, et al.*, 74 Cr. 251, pending in the Southern District, a new panel of defendants, not named as co-conspirators in the present indictment, are confronted with the million dollars as an alleged overt act.

It cannot be denied that the million dollar seizure is probative of DiNapoli's criminal activity of some kind, somewhere, at some time. But to consider it as "compelling evidence" of his membership in the conspiracy below is tantamount to concluding that it is compelling evidence of his participation in any and all acquisitive conspiracies of whatever kind or description might be conjured up against him. The *Geaney* requirements therefore become meaningless.

The four items of evidence relied upon by the Government can be sifted, shuffled and combined in any manner, yet there is still insufficient non-hearsay evidence to establish the probability of DiNapoli's membership in this conspiracy. The evidence would without doubt be insufficient to support DiNapoli's *arrest* on the charges below. *A fortiori* it doesn't warrant his conviction on hearsay. *Cf. United States v. Freeman*, 2d Cir. June 7, 1974 (Slip op. #1050).

B. The Substantive Count

The Government's response to DiNapoli's claim that the evidence, *including* hearsay, was insufficient proof of the substantive count (possession of two kilograms of heroin in

December, 1971) is to label it "frivolous" and to rely on *United States v. Annunziato*, 293 F.2d 373 (2d Cir. 1961). Such reliance, however, misses the point. Assuming *arguendo* the admissibility and the relevance of the evidence in support of count 21 (Dilacio told Pannirello that DiNapoli "was going to give him a kilo" for $22,000 (R2175); Dilacio said he was going to pick up the kilo and take it to Gamba, the stash (R2175); sometime thereafter, Pannirello picked up two packages from Gamba, said to be a kilo (R2177), there is no proof beyond reasonable doubt that DiNapoli actually delivered the kilo.[35]

A statement by one out-of-court declarant that another person is going to do something is inherently unreliable. As with traditional hearsay (*e.g.*, an account of a past event), the value of the evidence rests upon the out-of-court declarant's perception, memory and sincerity, and on the meaning of the words. See generally, McCormick, Evidence §295 (2d ed. 1972). The trier of fact is denied access to the basis of the speaker's claimed belief that the proclaimed plan or design was agreed to, is serious and will be carried out. Moreover, the possibility of unforeseen events intervening to thwart the plan is present in this kind of evidence, and must be considered in assessing its reliability. As a result, even those courts which admit statements of design to prove the *declarant* acted in accordance with the plan do not permit such statements as evidence that one other than the declarant (here, DiNapoli) also acted pursuant to the plan. *Id.* at p. 699. Manifestly, this evidence is not sufficiently reliable, in and of itself, to warrant conviction beyond reasonable doubt. *Cf. United States v. Puco*, 476 F.2d 1099 (2d Cir. 1973).

35. There was no evidence of *any* kind that DiNapoli had possessed *two* kilos, as charged in the indictment.

IV.

THE GOVERNMENT PROVED MULTIPLE CONSPIRACIES AND NOT THE SINGLE CONSPIRACY CHARGED IN THE INDICTMENT.

The Court's opinion rejecting appellant DiNapoli's multiple conspiracy argument leads to the conclusion that *Kotteakos v. United States*, 328 U.S. 750 (1946) has been emasculated.

The record at trial clearly established that even if DiNapoli was engaged in narcotics traffic, he was at a minimum a business competitor of Inglese. The Court points primarily to Barnaba and Mamone as the links that established that the "DiNapoli" and "Inglese" operations were a single venture (30a-31a). The Court adds moreover, that Pugliese had knowledge of intimate details regarding the Inglese operation (32a-33a), and that the two organizations were linked by sales to common distributors (33a).

John Barnaba was an independent contractor. He attempted purchases from Lessa, bought heroin from Inglese and Pugliese. He worked for no one but himself. The evidence established that he was not paid by either Inglese or Pugliese (much less by DiNapoli); that he purchased heroin at negotiated prices. At one time or another his business was solicited from Lessa, Pugliese, and Inglese, the latter asking that he deal exclusively with him to the exclusion of the others. Inglese required Barnaba to pay in advance but Pugliese was willing to trust Barnaba, and furnished him with heroin on consignment. While the Court assumed that this "may be taken as evidence of

mutual trust and cooperation between the operations and indicative of the link between them", it proves the exact opposite. It strains logic not to see that there was no joint sales policy between the two operations and that each vied for the other's customers. The fact that Inglese (Tramunti) mistrusted Barnaba and warned him not to purchase drugs from anyone and Pugliese (DiNapoli) extended credit, establishes no concert or agreement as to policy between the operations. Barnaba was not obligated to guarantee any quantity of purchases, nor required to have his customers either known or approved. He did not know Papa, the so-called common source of supply to both groups, from whom he purchased drugs through Lessa, nor did he attempt to identify DiNapoli in the courtroom, nor claim he knew him. Under the Court's reasoning, had Barnaba also purchased drugs from say Jack Spada, this would have meant that the Sperling operation was likewise a part of the present conspiracy. *United States v. Sperling,* No. 73-2363 (2nd Cir. Oct. 10th, 1974). The fact that Barnaba purchased drugs from Inglese and later from Pugliese is not proof that Inglese and Pugliese were partners in an unlawful agreement to violate the Federal Narcotics Laws, but simply establishes that Barnaba knew both individuals and dealt with each at arm's length.

The Court noted (8a, N.12) that Mamone was DiNapoli's partner and singled him out as decisive of the link between the two organizations. Mamone vouched for Barnaba's customer Forbrick to Inglese, in the sense that he could be trusted, since Inglese did not want to meet him personally. Such a recommendation meant not that Inglese (Tramunti) was Mamone's (DiNapoli) partner, but at most that Mamone was friendly with Inglese and trusted him. At most Mamone was a

casual facilitator who is entitled to the treatment of *United States v. Hysohion*, 448 F.2d 672 (2nd Cir. 1959). The assistance Mamone rendered Inglese in November, 1970, at the Beach Rose Club in helping him count money received from Barnaba as advance payment from Forbrick for narcotics (32a) was at best innocuous. Mamone was *not told* the money was for drugs. It did not result in Inglese giving Mamone any money or an order to supply narcotics. At best it was Mamone helping Inglese count undesignated money owing to Inglese for drugs to be supplied by Inglese. We do not question that the evidence in this respect points to the fact that Inglese and Mamone are friendly and that Inglese trusted Mamone in his "okay" of Forbrick and in counting the latter's money as an accommodation. The fact is that Barnaba was at the time Inglese's customer, and Inglese would not trust him in his recommendation of Forbrick nor in the accuracy of the count of the money advanced by Forbrick through Barnaba to Inglese. Finally, Mamone's offer of assistance to Barnaba regarding a dispute with one of his customers, Burke, depicts Mamone at best as a gratuitous interloper, since Mamone did not participate in Barnaba's transaction with Burke nor in any of the representations made nor the resulting disbursements. Furthermore, there was no set-off of any kind. Mamone was not offering to refund money nor to replace the narcotics. He was in effect offering to speak with Burke not to harm Barnaba. Mamone's activities on the trial record called by the Court as "somewhat shadowy" (39a) amounted to vouching, counting and offering to intercede to avoid personal violence to Barnaba.

CONCLUSION

For all the reasons set forth, the petition for a writ of certiorari should be granted; the judgments of conviction should be reversed, and a new trial should be granted.

Respectfully submitted,

s/ Frank A. Lopez
Attorney for Petitioner

APPENDIX A — OPINION OF THE COURT OF APPEALS, SECOND CIRCUIT, UNITED STATES v. TRAMUNTI, ET AL., F.2D (2ND CIR. 1975), SLIP OPINION NO. 253, DECIDED MARCH 7th, 1975

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 253, 257, 260, 266-74, 301-02, 309—

September Term, 1974.

(Argued October 25, 1974 Decided March 7, 1975.)

Docket Nos. 74-1550, -1560, -1615, -1535, -1562, -1570, -1659, -1759, -1773, -1832-33, -2119, -1768, -1616, -1561

UNITED STATES OF AMERICA,

Appellee,

v.

CARMINE TRAMUNTI, LOUIS INGLESE, DONATO CHRISTIANO, ANGELO MAMONE, JOSEPH DINAPOLI, FRANK PUGLIESE, JOSEPH CERIALE, JOHN GAMBA, VINCENT D'AMICO, FRANK RUSSO, WARREN C. ROBINSON, WILLIAM ALONZO, HATTIE WARE, JOHN SPRINGER and HENRY SALLEY,

Defendants-Appellants.

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Before:

WATERMAN, OAKES and GURFEIN,

Circuit Judges.

Appeal by 15 appellants from conviction of various federal narcotics laws. Trial was in the United States District Court for the Southern District of New York, before Kevin T. Duffy, *Judge,* and a jury.

Convictions of appellants Alonzo and Salley reversed, and Salley's remanded. Convictions of all other appellants affirmed.

HERBERT SIEGAL, New York, N.Y., *for Appellant Tramunti;*

STEVEN DUKE, New Haven, Conn. (Frank Lopez, Brooklyn, N.Y., of counsel), *for Appellant DiNapoli;*

IVAN FISHER, Rosner, Fisher & Scribner, New York, N.Y. (Nancy Rosner, Alan Scribner, of counsel), *for Appellants Inglese, Christiano and Ceriale;*

NANCY ROSNER, Rosner, Fisher & Scribner, New York, N.Y. (Ivan Fisher, Alan Scribner, of counsel), *for Appellant Inglese;*

ARTHUR GOLDEN, New York, N.Y. (Robert B. Fiske, Jr., of counsel), *for Appellant Gamba;*

ROBERT L. ELLIS, New York, N.Y., *for Appellant Mamone;*

MARTIN JAY SIEGEL, New York, N.Y., *for Appellant Springer;*

GARY R. SUNDEN, New York, N.Y., *for Appellant Alonzo;*

THEODORE ROSENBERG, Brooklyn, N.Y., *for Appellant Pugliese;*

GEORGE DAVID ROSENBAUM, New York, N.Y., *for Appellant D'Amico;*

ROBERT LEIGHTON, New York, N.Y., *for Appellant Robinson;*

JULIA P. HEIT, New York, N.Y. (Edward Panzer, of counsel), *for Appellant Ware;*

HARRY R. POLLAK, New York, N.Y., *for Appellant Salley;*

MICHAEL G. DOWD, Kew Gardens, N.Y., *for Appellant Russo.*

PAUL J. CURRAN, United States Attorney for the Southern District of New York (Thomas M. Fortuin, Thomas E. Engel, Frederick T. Davis, Jeremy G. Epstein, Lawrence S. Feld, John D. Gordan III, Assistant United States Attorneys, of counsel), *for Appellee.*

OAKES, *Circuit Judge:*

This is an appeal by William Alonzo, Joseph Ceriale, Donato Christiano, Vincent D'Amico, Joseph DiNapoli, John Gamba, Louis Inglese, Angelo Mamone, Frank Pugliese, Warren C. Robinson, Frank Russo, Henry Salley, John Springer, Carmine Tramunti and Hattie Ware from judgments of conviction entered on April 22, May 2, May 3, May 7, May 10 and May 22, 1974, in the United States District Court for the Southern District of New York after an eight-week trial before Kevin T. Duffy, Judge, and a jury.

INDICTMENT.

Indictment 73 Cr. 1099, filed December 6, 1973, which superseded indictments 73 Cr. 334 and 73 Cr. 931 filed April 13, 1973, and October 3, 1973, charged the 15 appellants and 17 other defendants in 30 counts, with a variety of violations of the federal narcotics laws. Count One charged the 15 appellants and 17 other defendants with a conspiracy to violate the federal narcotics laws from January 1, 1969, until December 6, 1973, the date of the filing of the indictment. Count Two charged Inglese with

a continuing criminal enterprise in violation of 21 U.S.C. § 848. Count Three charged Inglese and Joseph DelVecchio[1] with the receipt of 30 bags of heroin in June, 1969. Count Four charged Inglese and DelVecchio with receiving one-half ounce of heroin in June, 1969. Counts Five and Six charged Inglese with receiving one-ounce quantities of heroin in October, 1969. Count Seven charged Benjamin Tolopka[2] with receiving one-quarter kilogram of cocaine in August, 1970. Count Eight charged Inglese with receiving one-quarter kilogram of cocaine in September, 1970. Counts Nine and Ten charged Dominick Lessa with the sale of one-half kilogram of heroin and five-eighths of a kilogram of cocaine in October, 1970. Counts Eleven through Thirteen charged Inglese, DelVecchio and Christiano with selling three-quarter kilogram quantities of heroin in December, 1970. Count Fourteen charged Inglese with receiving one ounce of heroin in February, 1971. Count Fifteen charged Pat Dilacio[3] with possession of one-eighth kilogram of heroin with intent to distribute in May, 1971. Count Sixteen charged Frank Pugliese and Russo with possession with intent to distribute one-eighth kilogram of heroin in May, 1971. Count Seventeen charged Joseph Marchese[4] with possession of one-half kilogram of heroin with intent to distribute in June, 1971. Count Eighteen charged Dilacio and Pugliese with possession of one-half kilogram of heroin with intent to distribute in September, 1971. Count Nineteen charged Springer with possession of one-eighth kilogram of heroin with

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1 DelVecchio pleaded guilty to six counts, not including Count Three or Four.

2 A mistrial was declared as to Tolopka.

3 Dilacio became a fugitive prior to trial.

4 Judge Duffy entered a judgment of acquittal with respect to Joseph Marchese prior to submitting the case to the jury.

intent to distribute in November, 1971. Count Twenty charged Pugliese and Dilacio with possession of one-half kilogram of heroin with intent to distribute in September, 1971. Count Twenty-one charged DiNapoli and Dilacio with possession of two kilograms of heroin with intent to distribute in December, 1971. Count Twenty-two charged Pugliese and Dilacio with possession of three kilograms of heroin with intent to distribute in January, 1972. Counts Twenty-three and Twenty-four charged Inglese, DelVecchio, Thomas Lentini[5] and Ceriale with possession of three kilogram quantities of heroin with intent to distribute in July and October, 1972. Count Twenty-five charged George Toutoian[6] and D'Amico with possession of one-quarter kilogram of heroin with intent to distribute in November, 1972.[7] Count Twenty-six charged Russo with possession of one-quarter kilogram of heroin with intent to distribute on January 10, 1973. Count Twenty-seven charged Tramunti, Inglese, DelVecchio and Ceriale with possession of three kilograms of heroin with intent to distribute in May, 1973. Count Twenty-eight charged Inglese and Lentini with possession of one-half kilogram of cocaine with intent to distribute in May, 1973. Count Twenty-nine charged Lentini and Lessa with possession of one-eighth kilogram of cocaine with intent to distribute on May 30, 1973. Count Thirty charged Basil and Estelle Hansen with possession of 767 grams of heroin with intent

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5 Thomas Lentini pleaded guilty to Counts One and Twenty-three.

6 Defendant Toutonian was murdered prior to trial.

7 In connection with this charge, appellant D'Amico raises a "sufficiency" argument that the indictment charged a purchase of heroin in November, 1972, and the proof showed that this transaction occurred a month or two later.

to distribute on October 4, 1973.[8] Seven counts were severed prior to or during trial.[9]

Trial began on January 21, 1974, as to 18 defendants. During the course of the trial, the case against one defendant was severed.[10] Prior to submitting the case to the jury, Judge Duffy dismissed Count Twenty-seven. On March 13, 1974, after five days of deliberation, the jury found the appellants guilty on all remaining counts in which they were named.

FACTS.

At trial, five participants in the alleged conspiracy testified to its operations and personnel: John Barnaba, Frank Stasi, Henry Pannirello, Thomas Dawson and James Provitera. Their collective testimony, summarized below, and corroborated extrinsically in certain details, established the existence of a large, well organized conspiracy to buy, process and distribute narcotics in New York, New Jersey and Washington, D. C.

I. *John Barnaba's Testimony.*

John Barnaba was a middle level distributor in the narcotics conspiracy here charged. Initially he worked for and purchased narcotics through Inglese who was a principal in one branch of the narcotics operation. Subsequently, Barnaba worked for the other major branch of the opera-

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8 Both Basil and Estelle Hansen are fugitives.

9 Five counts—Nine, Ten, Fifteen, Twenty-two and Thirty—charged defendants who were not on trial. Count Twenty-six charging appellant Russo with distributing one-quarter kilogram of heroin on January 10, 1973, was severed at trial at the Government's request. Count Two was severed during trial.

10 Defendant Al Greene fell down a flight of stairs and fractured his skull during the trial.

tion headed by DiNapoli and Pugliese (see III, below). Owing to his unique position, Barnaba's testimony thus served to develop the general framework of the entire conspiracy and identify most of its major participants. From that testimony the jury may be taken to have found as follows.

A. *The Louis Inglese Operation: Inglese, Christiano, Mamone.*

Barnaba's latter-day involvement in the business of distributing narcotics began in 1969, in response to requests from a would-be customer, Richard Forbrick. In July of 1969, Barnaba met with appellant Inglese, whom he had known for some 15 years, and asked if Inglese could supply him with "goods." Inglese said that he could and told Barnaba that he could be reached at the Beach Rose Social Club or Beach Rose Club, located at 3202 Wilkinson Avenue in the Bronx.

The following month, Barnaba in the Beach Rose Club placed an order with Inglese for a quarter kilogram of heroin (at a price of $5,500) and the same amount of cocaine (at $3,000), or, in the parlance, "a quarter of H and a quarter of coke." Inglese's associates, DelVecchio and Christiano, passed the narcotics to Barnaba later that night. Barnaba then delivered the heroin to Forbrick and the cocaine to Forbrick's customer, Benjamin Tolopka. When Barnaba later made payment to Inglese for these drugs he was told that in future transactions payment had to be in advance of delivery.

In September and early November of 1970, Barnaba made three more purchases of drugs from Inglese. In late November of 1970, while Barnaba was making yet another such purchase, he came in contact with appellant Mamone. Mamone, who was present at the Beach Rose Club when

Barnaba was making a payment to Inglese, was summoned by Inglese, and together they counted Barnaba's payment.[11] Subsequently, Mamone was to be of considerable assistance to Barnaba in his narcotics dealings.[12]

In December, 1970, Barnaba paid Inglese $3,500 received from Forbrick for an eighth of a kilogram of heroin. When after ten days or more Inglese was unable to supply the "eighth," Forbrick asked Barnaba to get back his $3,500. Barnaba went to the Beach Rose Club to tell Inglese of Forbrick's concern, suggesting in Mamone's presence that Inglese meet Forbrick in order to allay the latter's fears and to make it possible for him to deal directly with Inglese should something happen to Barnaba. Inglese replied that he did not want to meet Forbrick, but when Mamone, who was listening, made assurances that (in Barnaba's words) "he was all right, . . . he knew his wife, . . . he was okay, there was nothing wrong with him," Inglese relented. After Mamone had vouched for Forbrick, Barnaba introduced Forbrick to Inglese at the Club and Forbrick accepted Inglese's suggestion that he await delivery. After additional delay in delivery of this order, however, Barnaba, at Forbrick's urging, recovered the $3,500 from Inglese and returned it to Forbrick.

After a brief hiatus in early 1971, Barnaba resumed his narcotics dealings in June, 1971, when he obtained $3,000

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11 On this occasion, the delivery of the heroin to Barnaba was made later that night by Christiano in the presence of Inglese and DelVecchio, in the back yard of Inglese's residence in the Bronx.

12 Barnaba testified that Dilacio, a member of the DiNapoli/Pugliese operation, informed him that "Butch" Mamone was DiNapoli's partner in the narcotics business. This hearsay testimony was admissible against Mamone once it was established that Mamone was a member of the conspiracy, and against DiNapoli once it was established that he was a member of the conspiracy. *United States* v. *D'Amato*, 493 F.2d 359 (2d Cir.), *cert. denied*, 43 U.S.L.W. 3208 (U.S. Oct. 15, 1974).

worth of narcotics from Inglese for sale to a new customer named Burke. Burke was dissatisfied with the quality of the drugs and demanded the return of his money. In an attempt to get the money, Burke sent two men, one carrying a gun, in search of Barnaba, and later Burke himself sought out Barnaba at his home.

Barnaba later mentioned the Burke affair to Inglese at a time when Mamone was present; Mamone told Barnaba that he would contact Burke to try to "straighten out" Barnaba's problem. Mamone told Barnaba that Burke was also his customer and that Burke owed him $25,000 or so. Two or three days later outside the Beach Rose Club at a meeting filmed by a city detective Mamone informed Barnaba that he had told Burke to deduct the $3,000 from the money owed by Burke. Mamone said that now Barnaba owed him the $3,000. Mamone's call on Burke was apparently successful, for Barnaba never heard from him or his gun-carrying friends again.

B. *The Joseph DiNapoli Operation: DiNapoli, Pugliese, Dilacio.*

In July or August of 1971, Barnaba met appellant Frank "Butch" Pugliese outside of the Beach Rose Social Club. Barnaba's drug business was "doing bad," possibly because of a shortage of customers or supply. In any event, Pugliese introduced him to a new customer, John "Hank" Springer, informing the latter that thereafter if he needed anything he should get it from Barnaba. Pugliese, who was soon to go to jail, then introduced Barnaba to Pannirello and defendant Dilacio, telling these two that they should supply Barnaba with heroin on consignment, the price being agreed upon at $25,000 per kilogram. A few nights later Barnaba filled Springer's order for one-eighth of a kilo of heroin at $3,500 with heroin obtained from Dilacio at $3,000.

Thus, Barnaba was accepted into what will be seen as the DiNapoli-Pugliese branch of the conspiracy. While Inglese had required that Barnaba pay *in advance* for his drug purchases, Barnaba worked on consignment with the Pugliese-DiNapoli group. Barnaba continued to work with Pannirello and Dilacio, selling drugs obtained from them to Springer and appellant Russo, until November, 1972, when he (Barnaba) was arrested on narcotics charges by the New York City police.

II. *Frank Stasi's Testimony: Inglese, Ceriale, D'Amico.*

The testimony of Frank Stasi, in the light most favorable to the Government, served to develop further the workings of the Inglese narcotics operation. Stasi, who worked for a time as a steward at the Beach Rose Social Club, had frequent contact there with Inglese, DelVecchio, Mamone and Christiano.

Stasi was involved in a series of at least eight "mixing sessions," some at his own apartment, some at DelVecchio's apartment. In each of these he, DelVecchio, on one occasion Christiano and on two occasions defendant Lentini mixed three kilograms of heroin with the dilutant mannite to obtain 12 half-kilogram packages.[13] Much of the mannite was obtained from appellant Ceriale at a price of $2,000 for three kilos. For all but the first mixing session, Inglese paid Stasi $2,000, the payments taking place at the Beach Rose Social Club, the "Blue Lounge" or in Inglese's own basement. Occasionally Stasi was paid by Inglese after the latter's receipts were counted by the two of them, Del-

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13 Objective proof of the "mixing sessions," four of which took place at Stasi's own apartment, was obtained by a forensic chemist who, after Stasi's arrest, obtained a trace of heroin from between the leaves of Stasi's kitchen table and traces of mannitol (the main ingredient of mannite) under the refrigerator.

Vecchio and on one occasion Christiano. Money, totaling $30-40,000 each time, was counted and separated into stacks of $1,000.

The Inglese group had operated out of the Beach Rose Social Club for some time, but when in April, 1972, it was discovered (by a tip from some men working on the elevated railway on Wilkinson Avenue) that the Club was under police surveillance, LoPiccolo's Espresso House became a center for the narcotics business. A substantial amount of Stasi's testimony dealt with meetings at LoPiccolo's, and conversations overheard there involving Inglese's alleged partner, Carmine Tramunti, who ran a card game there. A more detailed statement of the facts involved in these conversations will be developed later in discussing appellant Tramunti's participation in this conspiracy.

Stasi also recounted obtaining a small amount of cocaine and using it as a sample which he gave to appellant D'Amico at the Centaur Bar on 46th Street in Manhattan, and subsequently a $7,000 heroin sale from Stasi to D'Amico.[14]

III. *The Testimony of Harry Pannirello, Jimmy Provitera and Thomas Dawson.*

The testimony of Pannirello, Provitera and Dawson, again in its best light from the Government's point of view, revealed in detail the inner workings of the DiNapoli-Pugliese sphere of the narcotics distribution operation. Each of these three played an important role in providing a supply of narcotics to a number of middle level distributors.

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14 This meeting at the Centaur was observed by a plainclothes police officer. After Stasi's arrest on May 22, 1973, he agreed to cooperate with police. He was released and is in federal protective custody, having assumed a new identity.

Appendix A — Opinion of the Court of Appeals

A. *The Pugliese-DiNapoli Operation: Alonzo, Hattie Ware and DiNapoli.*

In April, 1970, Pugliese introduced Pannirello to appellant Hattie Ware and to two fugitive defendants, Basil Hansen and his wife Estelle ("Bunny"), and the late Al Greene, distributors who operated out of two apartments in a building at 1380 University Avenue in the Bronx. Thereafter, Pannirello delivered numerous packages of narcotics to Greene and Basil Hansen, with Hattie Ware often present. Pannirello and his associate, Dilacio, sometimes paid Hattie Ware to deliver to the same two distributors.

On one occasion the appellant Alonzo, Hattie Ware's brother, asked Pannirello if he could obtain an amount of heroin "to start off small." Pannirello offered Alonzo two ounces of heroin for $2,000 and Alonzo accepted, paying only $1,000 or $1,500, however.

Thereafter, Provitera, Pannirello's brother-in-law, started making narcotics deliveries at 1380 University Avenue. On the first of these, Pannirello introduced him to Hattie Ware and Alonzo. Eventually, Basil Hansen arrived; Alonzo, Pannirello, Provitera and Hansen went to Alonzo's bedroom where Provitera and Pannirello handed a package of heroin to Hansen. Provitera subsequently delivered packages to Ware for Basil Hansen, as well as directly to Hansen in the street outside the University Avenue apartment house.

Pannirello also had direct dealings with appellant Joseph DiNapoli. In June of 1971 Pannirello accompanied Pugliese to the residence of Genevieve Patalano, DiNapoli's girlfriend, at 1908 Bronxdale Avenue in the Bronx. At this time Pugliese indicated that he was working with or for DiNapoli and that he had money to be delivered. He had decided, however, not to give DiNapoli all the money, but

instead hid some of it in a sock. DiNapoli accepted this money, some $8,000 or $10,000, without even counting it all out.

Pugliese went to jail in October, 1971. Before he left, he turned over some of his narcotics business to Pannirello and Dilacio. Pugliese told Pannirello and Dilacio that he was leaving two kilograms of heroin and some cash with them. It was agreed that Dilacio was to be the sole contact with DiNapoli, paying DiNapoli $22,000 per kilogram of heroin, and taking it to a "stash," whence Pannirello would make future pick-ups and deliveries. Pannirello and Dilacio were also to deliver narcotics on consignment to Barnaba at wholesale prices. Dilacio was to pick up two kilograms immediately from DiNapoli and store them in Pugliese's garage. Pannirello and Dilacio were to pay over some of the profits to Pugliese's wife but to save the rest until Pugliese's release, whereupon they were to divide it up.

The next night Pannirello went to the "stash," a garage near Pugliese's house, obtained a half kilogram of heroin, and delivered it to Thomas "Tennessee" Dawson, one of Pugliese's customers from Washington, D. C., for $16,000 in cash. Pannirello then distributed the remaining one and a half kilograms among Barnaba, Basil Hansen and Al Greene.

Five or six months after Pannirello saw DiNapoli accept drug money from Pugliese, in late November or December, 1971, Dilacio told Pannirello that he had called DiNapoli to get some heroin and that DiNapoli was going to furnish him a kilogram for $22,000.[15] Dilacio said he would pick

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15 Hearsay cannot, as we said in *United States* v. *Cirillo*, 499 F.2d 872, 885 (2d Cir. 1974), "be used as a supplement to, much less as a substitute for, insufficient nonhearsay proof." Hearsay implicating one conspirator from a coconspirator is admissible, however, once there is sufficient independent evidence to show the first to be a member of the

up the heroin from DiNapoli and take it to a "stash" at appellant John Gamba's house. Pannirello went to Gamba's house, met Dilacio and examined the kilogram of heroin in Gamba's presence. Gamba was paid $300 a week for storing the heroin. On one occasion in December, 1971, or January, 1972, in Pannirello's presence, Dilacio called "Joe" [DiNapoli] on the phone to buy narcotics but, as Dilacio told Pannirello, "Joe told him to sit tight and he'll let him know as soon as something comes up, but there was nothing happening right now."

Further evidence as to DiNapoli was obtained on February 3, 1972, while agents of the Joint Narcotics Task Force were conducting surveillance of his lady friend's house at 1908 Bronxdale Avenue in the Bronx. At about 8:45 p.m. Vincent Papa (an unindicted coconspirator) drove up with Joseph DiNapoli at his side. DiNapoli left the vehicle carrying a large suitcase. An officer conducting the surveillance testified that the suitcase was being carried with one hand and appeared light. Sometime later, Papa and DiNapoli left the house, the latter carrying what appeared to be the same suitcase; now, however, the police officer testified, DiNapoli was carrying it with two hands, as if it were heavy. Both men got back in the car and after driving seven blocks were arrested. The arresting officers opened the suitcase and found that it contained $967,450, principally in $100 and $50 bills. [16]

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conspiracy. *See United States* v. *D'Amato, supra* note 12; *United States* v. *Manfredi*, 488 F.2d 588 (2d Cir. 1973), *cert. denied*, 43 U.S.L.W. 3667 (U.S. June 3, 1974). There is no confrontation problem where both declarant and listener knew themselves to be members of the conspiracy at the time the statement is made. *United States* v. *Mallah*, No. 74-1327 (2d Cir. Sept. 23, 1974), slip op. 5475, 5487-88.

16 The defense presented evidence that DiNapoli was a major participant in the loanshark or shylocking business (for which he was convicted and sentenced to three years imprisonment), and the argument was that the

There are substantial legal and factual disputes in connection with this seizure, the appellants contending that the police lacked probable cause to make the seizure. Therefore the facts will be stated in greater detail below in connection with the discussion of the issues raised by the seizure and the introduction of the $967,450, or more accurately a photo of same, into evidence.

B. *John Gamba and John Springer.*

In the spring of 1972, Pannirello introduced Provitera to the appellant Gamba. Provitera then began picking up packages of drugs from him at his house on Rosedale Avenue in the Bronx. On Provitera's second visit, Gamba helped Pannirello mix, weigh and package heroin. Subsequently, Provitera picked up packages from Gamba on two occasions and delivered them to Basil Hansen. In June, 1971, Pugliese took Pannirello to the apartment of appellant Springer to collect money owed to Pugliese by Paul DiGregorio, who worked with Springer in the narcotics business and was agent for Pugliese.[17]

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suitcase money came from this other form of illegitimate enterprise. But the drug activities at 1908 Bronxdale Avenue (see below) and the accompaniment of Vincent Papa doubtless could have induced the jury to think that some of this money was drug money; Pugliese had told Barnaba that Papa (whom Pugliese called "Uncle") supplied Inglese with heroin and had told Pannirello that DiNapoli was in partnership in the narcotics business with "Vinnie." It was stipulated to that this "Vinnie" was not appellant Vincent D'Amico; the jury might have inferred that it was Papa, an unindicted coconspirator, since he was the one accompanying DiNapoli to 1908 Bronxdale Avenue where they picked up the $967,000 in cash.

17 DiGregorio, "The Arrow," would *inter alia* collect money for narcotics sold to Washington, D. C., dealer Warren Robinson. When Thomas "Tennessee" Dawson met DiGregorio the latter was limping from a shot in the knee he said he had received from Pugliese. DiGregorio said he had been told by Pugliese to collect the money owed Pugliese by Robinson or not come back to New York. *See* IIID *infra*.

Further evidence against Springer was uncovered when, on December 3, 1973, officers of New York City's Organized Crime Control Bureau went to his apartment to execute a bench warrant for his arrest based upon his failure to appear on the indictment in this case. In the apartment they found, in addition to Springer, quantities of heroin and cocaine.

C. *Frank Russo.*

Frank Russo was implicated in this conspiracy through his contact with both Barnaba and Pannirello. In the spring of 1972 Pannirello met the appellant Russo, who purchased one-half kilogram of heroin which he later returned after his customer refused to pay. On the night of January 5, 1973, at a meeting among Russo, Barnaba and an undercover agent of the New York City Police Department, Russo gave the undercover agent a sample of heroin. After an unsuccessful attempt to buy a half kilogram of heroin on January 9, 1973, the undercover agent, again accompanied by Barnaba, bought approximately a half kilo from Russo for $19,500. On January 16, 1973, Russo again delivered heroin to the undercover agent to make up for the fact that the previous delivery was found to amount to less than a full half kilogram.

D. *The Washington, D. C., Distribution: Warren Robinson and Henry Salley.*

Beginning in February, 1971, Thomas Dawson purchased one-half kilogram of heroin every week or so from Pugliese directly and from Pugliese's agent, Paul DiGregorio, the heroin going to Washington, D. C., where appellant Robinson cut the narcotics and distributed them to retailers in the area.

In August, 1971, Pugliese drove Pannirello to a street near Co-Op City in the Bronx and introduced him to

Dawson. Pugliese told Dawson that Pannirello would take over his narcotics business when Pugliese went to jail. Subsequently Pannirello and Pugliese sold Dawson a half kilogram of heroin for $16,000 in cash.

Thereafter, Dawson was a regular purchaser of heroin from Pannirello, for distribution by Robinson in Washington. Deliveries to Dawson were in the parking lot of a Howard Johnson's on Route 46 in New Jersey, where in the spring of 1972 Dawson introduced Pannirello to Robinson. At this meeting Pannirello sold a kilogram of heroin to Robinson for $37,000. Later Robinson became the pick-up man, and in late May, 1972, Pannirello sold two or three kilograms of heroin to him at $37,000 each. Thereafter, Provitera made numerous deliveries of quarter kilos to Robinson at the Route 46 Howard Johnson's at the going high price.

Although business slowed up in the summer, deliveries to Robinson were resumed in the fall of 1972; that Howard Johnson's had a twenty-ninth flavor. On one delivery in October of that year, Robinson introduced Provitera to appellant Salley. Robinson said that Salley was "his man" and that deliveries should be to Salley thereafter. Two weeks later, Provitera, on Pannirello's instructions, delivered heroin to Salley at the same location and told Salley that Pannirello would be in touch with Robinson. In November Pannirello and Provitera drove again to the Howard Johnson's to meet Robinson; Salley told them that Robinson was on his way from Washington, and when Robinson arrived, Pannirello and Provitera accompanied him to Salley's motel room. There Robinson, in Salley's presence, registered a customer's complaint, that previously furnished "dope" was of bad quality. The four then arranged for delivery of one kilogram of heroin and Robinson paid Pannirello $19,000.

In February, 1973, Pannirello and Provitera were arrested after making three heroin sales to an undercover agent of the Drug Enforcement Administration, after which both agreed to cooperate with the Federal Government in this case.

DISCUSSION.

I. *The arrest of appellant DiNapoli and the search and seizure of the suitcase.*

Appellants claim that the $967,450 found in a suitcase in the possession of appellant DiNapoli and Vincent Papa was seized illegally and that its contents should have been suppressed.[18] Their arguments, stated in summary fashion, are that the police had neither probable cause to arrest Papa and DiNapoli nor probable cause to search the suitcase. Further, appellants maintain that even if the police had probable cause to arrest Papa and DiNapoli, the contents of the suitcase should not have been admitted into evidence since the search of the suitcase was neither incident to the arrests nor was it valid under any exception to the fourth amendment's requirements for probable cause. We find to the contrary that there was both probable cause to arrest DiNapoli and Papa and to search the suitcase in question.

As the Supreme Court has stated, "The constitutional validity of a warrantless search is preeminently the sort of question which can only be decided in the concrete factual context of the individual case." *Sibron* v. *New York*, 392 U.S. 40, 59 (1968). We turn then to the events

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18 Appellants DiNapoli, Inglese, Christiano, Ceriale and Pugliese all claim that the money was illegally seized; however, only DiNapoli, from whom the money was seized, has standing to challenge the legality of the seizure. *Brown* v. *United States*, 411 U.S. 223 (1973); *Alderman* v. *United States*, 394 U.S. 165, 174 (1969).

of the evening of February 3, 1973, as recounted by Judge Duffy in his opinion on the suppression hearing. *United States* v. *Tramunti*, 377 F. Supp. 1 (S.D.N.Y. 1974).

On that rainy evening, Patrolman John Reilly and (then) Detective John Spurdis of the New York Joint Narcotics Task Force drove in an unmarked police car to the vicinity of 1908 Bronxdale Avenue, Bronx, New York, to execute a "John Doe" narcotics arrest warrant. The reasons which led them to believe that the arrest target might be at the Bronxdale Avenue house were as follows. One Frank Facchiano had been observed by the police on September 2, 1971, while engaging in two heroin sales at the Cottage Inn Bar & Grill in the Bronx, which on at least four occasions was used as a location for narcotics transfers. During these transactions, Facchiano had been observed in conversation with someone seated in a car registered to Genevieve Patalano (later identified as Joseph DiNapoli's girlfriend), at the 1908 Bronxdale Avenue address. Furthermore, in October, 1971, the owner of the Cottage Inn Bar & Grill, Joseph DiBenedetto, was observed leaving the very same address in possession of a stolen car; when he was arrested, he falsely claimed that he resided at that address. Prior to the night of February 3, 1972, Patrolman Reilly had been on surveillance at that address for some 20 evenings in the hope of finding "John Doe #3," one of the persons seen engaged in the transactions with Facchiano at the Cottage Inn Bar & Grill. *United States* v. *Tramunti*, 377 F. Supp. at 2.

At 8:30 p.m. Reilly and Spurdis saw an unidentified older man leave the one-family house, enter an automobile, and drive off. At 8:45 p.m. a 1968 green Pontiac pulled up in front of the house and stopped. Joseph DiNapoli (who was not identified until the time of his arrest) emerged from the passenger side of the car carrying a suitcase in one hand. The driver of the car made a "U"

turn, parked on the opposite side of the street and also emerged. Reilly and Spurdis immediately recognized the driver as Vincent Papa, whose record involved a previous narcotics conviction. Upon information from someone they then thought was a reliable informer, they suspected Papa to be a major narcotics trafficker,[19] and at least Group

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19 On December 18, 1973, less than two months before the arrest of Papa and DiNapoli, Pallatroni had arrested a narcotics dealer named Stanton Garland, who thereafter provided further information about Papa's recent narcotics activities. Garland told Pallatroni and other agents that he could introduce an undercover agent to Rocco Evangelista and Daniel Ranieri, who he said were distributing narcotics for Vincent Papa, for the purpose of purchasing a minimum of a kilogram of heroin which at that time sold for $25,000. Garland further stated that he personally had discussed narcotics with Papa on two separate occasions. Garland identified Papa, Evangelista and Ranieri in photographs shown to him and a significant part of the information which he provided concerning them was independently corroborated by the agents.

Appellants argue that the information supplied by Garland should be discounted in evaluating whether the officers had probable cause to arrest Papa and DiNapoli or to search the suitcase in question. They argue, in essence, that the Garland information was stale because a month and a half had elapsed between the time that the information was given and the time of the events in question. In addition, they argue that Garland was unreliable as an informer, because he had become a fugitive rather than testify in another case, and because he committed various criminal acts while supposedly cooperating with the Joint Task Force. *United States* v. *Tramunti*, 377 F. Supp. 1, 2 (S.D. N.Y. 1974). But Garland's information was very general, indicating only Papa's position as a high echelon figure in narcotics trafficking, not the sort of information that would become stale quickly. Garland's information was in many ways only cumulative to what the officers already knew. Quite obviously knowledge that a suspect has been a narcotics dealer or offender or has consorted with a narcotics dealer may be one important element of probable cause. *United States* v. *Harris*, 403 U.S. 573, 583 (1971).

As to appellants' claim of unreliability, this court has recently observed:

> Informants in drug cases are not Brahmins, nor are they noted for long term occupancy of well-tended premises. Their disappearance, voluntary or otherwise, is not extraordinary.

United States v. *Malizia*, No. 74-1389 (2d Cir. Sept. 17, 1974), slip op. at 5467, *quoting United States* v. *Super*, 492 F.2d 319, 322 (2d Cir. 1974).

Supervisor Peter Pallatroni knew that Papa had been indicted for narcotics violations in the Eastern District of New York. *Id.* at 2-3.

Both DiNapoli and Papa entered the house without knocking or waiting to be admitted. Reilly radioed Pallatroni who, accompanied by Special Agent James Reed, also drove to 1908 Bronxdale Avenue. When Pallatroni arrived, Spurdis reported what he and Reilly had observed.

Pallatroni, a highly experienced narcotics agent, had been a Special Agent with the Drug Enforcement Administration for eight years and for two years had supervised a group of ten narcotics agents. He had participated in approximately 100 investigations of narcotics wholesalers resulting in the arrest of more than 200 major narcotics violators.

Pallatroni testified that at the time of this arrest Vincent Papa was regarded by the Bureau of Narcotics and Dangerous Drugs as "one of the top narcotics traffickers" in the United States. He was fully aware that Papa had been convicted of violation of the federal narcotics laws and that he had been sentenced to five years in prison.

In addition to the information supplied by Garland, note 19 *supra,* Pallatroni was aware, as we have said, that Papa and approximately 20 other persons had been named in a federal narcotics conspiracy indictment, filed in the Eastern District of New York, which had been unsealed in January, 1972. Pallatroni also knew from surveillance he had conducted that Papa had a relationship, dating back to 1967, with Facchiano, one of the targets of the investigation which had led the officers to 1908 Bronxdale Avenue.

Thus, the officers were reasonably alerted simply by Papa's presence at this particular address to the very live possibility that a narcotics transaction was in the making. The officers' suspicions were quite reasonably reinforced by the events which later transpired.

Upon receiving from Spurdis the license plate number of the green Pontiac in which Papa had arrived, Pallatroni radioed the information to the headquarters of the New York Joint Task Force to ascertain the name of the record owner of the car. Pallatroni testified that he was informed that the vehicle was a rental or leased car owned by "Wide World Leasing Corporation" of Far Rockaway, New York. Pallatroni had information that Papa owned two cars.

The use of a lease or rental car by a major narcotics violator was in and of itself significant. Experienced narcotics officers know that individuals engaged in narcotics trafficking and other areas of organized crime frequently use rented or leased vehicles in an effort to conceal their identity. They also know that many of these criminals are aware that cars used to transport narcotics or other contraband, if seized, are generally subject to forfeiture, unless the owner is an auto rental company.

Appellants sharply contest the reliability of Pallatroni's testimony in this matter. The foundation for their argument is a log which was kept of communications between Pallatroni and the police station which provided him with what Pallatroni testified was the information that the car being driven by Papa was one belonging to Wide World Leasing.

The existence of the log was, appellants maintain, an issue which was raised below; appellants, however, contend that the Government failed to disclose its existence. The Government claims that here was no such suppression of evidence and that the log in question was obtainable by the defendants at the original suppression hearing before Judge Duffy had they asked for it.

We do not have to resolve this issue, however. Testimony concerning this log was recently developed in a hearing before Judge Charles L. Brieant of the United States

District Court for the Southern District of New York, unrelated to the present case but involving some of the same evidence. In order to avoid the necessity of remand on this issue, this court will address itself to the question of probable cause taking into account the transcript of the hearing held before Judge Brieant as requested by appellants' motions.

Appellants maintain that the log in question shows that Pallatroni radioed in a "dealer" plate on the car driven by Papa and that he received the information that the plates belonged to "Wides Motor *Sales.*" Pallatroni steadfastly maintained at the hearing before Judge Brieant that he was told that the car belonged to "World Wide Leasing."

Appellants argue with more bombast than effect that this new knowledge is significant in that it undermines Pallatroni's basis for suspecting that a narcotics sale was in progress and that a *leased* car was being used in order to prevent a forfeiture of the vehicle in the event of arrest. Appellants suggest that there will not be remittal when a *dealer* lends a car. *See Calero-Toledo* v. *Pearson Yacht Leasing Co.*, 416 U.S. 663, 689 n.27 (1974). Even if this were so, there remains the fact that use of a dealer's car quite as effectively as the use of a rented car conceals the identity of the operator of a vehicle—a factor which a trained police officer would treat as important in assessing the events that took place on the evening of February 3, 1973. When one is dealing with large amounts of heroin (or cash), moreover, the complexities in the Government's forfeiture treatment of automobiles may well not be uppermost in one's mind, nor would they enter into the police officer's. Thus even viewing the evidence raised before Judge Brieant in the light most favorable to appellants, Officer Pallatroni would still have had extra reason to suspect the nature of Papa's activities on the night in ques-

tion. The events occurring shortly thereafter ripened reasonable suspicion into probable cause for belief that Papa was engaging in a major narcotics violation under the eyes of the officers surveilling the house.

At about 8:55 p.m. Reilly observed three women leave the house at 1908 Bronxdale Avenue, enter a car and drive off. They returned about 15 minutes later.

At about 9:15 p.m. Reilly and Spurdis observed a man leave the house surveillance and enter a car. When they communicated this information to Pallatroni, he followed the departing car in his own vehicle. When the car appeared to be traveling in a circular route, Pallatroni and Reed ceased their surveillance and immediately returned to 1908 Bronxdale Avenue.[20]

Both Pallatroni and Reed testified, and we find plausible, that they then believed that this car was being used to "take the heat off" a major narcotics transaction by diverting surveillance officers away from the scene. Pallatroni testified that he had observed such diversionary tactics on prior occasions involving narcotics transactions.

Appellants contend that the log in evidence before Judge Brieant indicates that Officer Pallatroni checked on the registration of the vehicle which they had been following and knew that it belonged to Richmond and knew him to be an attorney. For this reason appellants claim that the officers could not have reasonably concluded that the car was a decoy. Even assuming that Officer Pallatroni was aware that the car belonged to Richmond, it would not follow that he thought that Richmond was driving the car and, in any event, the manner in which the car was being

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20 The owner of the vehicle, Murray Richmond, an attorney, testified at the hearing that while he did not recall the drive on February 3, 1972, he may have missed a turn on the route which could have given the impression that he was driving in a circle.

driven could have been taken by a reasonable man to have been suspicious. Attorneys, unlike Calpurnia, are not necessarily always above suspicion, even in narcotics cases.

Shortly after Pallatroni and Reed returned to the vicinity of 1908 Bronxdale Avenue, they were advised by Patrolman Reilly that two men had left the house and had sped off so as to prevent the officers from reading their license plates. At 9:30 p.m. Papa and DiNapoli (still unidentified) left the house at 1908 Bronxdale Avenue. Reilly radioed Pallatroni with the information that these two were leaving and that one of them was carrying with two hands what appeared to be a very heavy suitcase. At first Reilly thought it was Papa who was carrying the suitcase, but as the two descended the steps of the building, he saw that it was the person who was later identified as DiNapoli.

Both DiNapoli and Papa entered the green dealer's Pontiac, putting the weighted suitcase on the back seat. Papa drove the car while DiNapoli was seated in the front passenger seat. Pallatroni and Reed immediately followed in their vehicle, having been informed by Reilly that Papa had left, and that the suitcase "appeared to be heavy."

After several blocks, the Reilly-Spurdis car took the lead position in the surveillance. When the green Pontiac took a turn, Pallatroni became apprehensive about losing it and instructed the lead car by radio to stop Papa's car. Spurdis pulled his vehicle alongside the Pontiac and Reilly held his badge out the car window (about an arm's length from Papa) and shouted to Papa to pull over. Spurdis drove his car in front of the Pontiac and Pallatroni stopped his car behind the Pontiac.

Papa left the Pontiac with DiNapoli and the suitcase inside and walked forward toward Spurdis and Reilly. Pallatroni concluded that this was designed to draw attention away from the car and its contents since most people

remain in their cars when stopped by police officers. Under Pallatroni's instructions, Spurdis arrested Papa for violation of the federal narcotics laws. Pallatroni and Reed opened the door of the Pontiac, removed DiNapoli from the car and also placed him under arrest for violation of the federal narcotics laws. After searching DiNapoli for weapons, Pallatroni returned to the Pontiac where he observed Spurdis examining the open suitcase which had been placed on the street.

The sum total of events gave the officers observing 1908 Bronxdale Avenue on the night in question sufficient reason to believe that a narcotics transaction was probably taking place. The fact that some of the officers' beliefs were later proved untrue in no way affects the issue of probable cause so long as the facts reasonably or sensibly led to the officers' conclusions of a probable offense, and these conclusions were "drawn by the light of the particular situation and with account taken of all the circumstances." *Brinegar* v. *United States,* 338 U.S. 160 (1949). The facts in the present case fully justify a conclusion that probable cause existed to arrest DiNapoli and Papa.

Appellant DiNapoli also claims that even if there existed probable cause to arrest him, the officers should not have opened the suitcase in the back seat of the car without a search warrant. He argues that since upon his and Papa's arrest they were handcuffed, the possibility that either could obtain a weapon from or destroy the contents of the suitcase was eliminated. The appellants argue further that since the suitcase was opened after both Papa and DiNapoli were outside of the car, the suitcase was not in the area "within [the] immediately control" of either so as to justify a search under *Chimel* v. *California,* 395 U.S. 752, 763 (1969).

While the Government would justify the search under *United States* v. *Edwards*, 415 U.S. 800 (1974), on the broad basis that arresting officers may properly take, examine and preserve for use "the personal effects of the accused," we need not go so far. Here the suitcase was "closely related to" the reason appellant was arrested and the reason the auto was stopped, *see Cooper* v. *California*, 386 U.S. 58, 62 (1967), *and* there was probable cause to believe, as these officers did, that the suitcase contained contraband. The Supreme Court has made it clear, moreover, that a different set of rules prevails as to searches of automobiles (as opposed to homes or offices) "provided that there is probable cause to believe that the car contains articles that the officers are entitled to seize." *Chambers* v. *Maroney*, 399 U.S. 42, 48 (1970) (search for guns and stolen money); *Carroll* v. *United States*, 267 U.S. 132 (1925); *but cf. Coolidge* v. *New Hampshire*, 403 U.S. 443 (1971) (police entering upon private property to seize and search unoccupied vehicle). Here there was, as we have said, probable cause to think that the suitcase in the auto contained narcotics. The fact that Papa and appellant DiNapoli had been apprehended makes no difference, *United States* v. *Christophe*, 470 F.2d 865, 868-69 (2d Cir.), *cert. denied*, 411 U.S. 964 (1972), for to have taken the time to obtain a warrant to search a vehicle driven by one alleged to be a major narcotics trafficker like Papa near an intersection at night was to run risks not precisely foreseeable by the officers on the spot, but risks nevertheless; proof that contraband was in the suitcase, moreover, might have led to further immediate police action back at 1908 Bronxdale Avenue. *Cf. United States* v. *Ellis*, 461 F.2d 962, 966 (2d Cir.), *cert. denied*, 409 U.S. 866 (1972). While, despite *Chambers* v. *Maroney, supra*, it may be argued that whenever matters sufficiently sta-

bilize a warrant should be obtained, and the whole purport of the fourth amendment is to keep overzealous police conduct within bounds, *see* Amsterdam, Perspectives on the Fourth Amendment, 58 Minn. L. Rev. 349, 416 (1974), here the search was immediate, on-the-spot, and of a container reasonably thought to contain narcotics. *United States* v. *Soriano,* 497 F.2d 147, 149 (5th Cir. 1974) (en banc).

In the end, to find what is "reasonable" under the fourth amendment is our quest, *United States* v. *Albarado,* 495 F.2d 799 (2d Cir. 1974), and the somewhat elastic view of reasonableness taken by the Supreme Court in respect to searches of mobile autos compels us to a conclusion favorable to the Government. *Compare Chambers* v. *Maroney,* 399 U.S. at 51-52, *with Cardwell* v. *Lewis,* 417 U.S. 583 (1974).

Irrespective of the fourth amendment problems, the question still remains, of course, whether evidence of the money seized was relevant and otherwise admissible. We believe it was. DiNapoli had in June, 1971, less than eight months before the seizure, received $8,000-$10,000 of narcotics money from Pugliese at the Bronxdale Avenue house. Pugliese had told Pannirello that DiNapoli was in a narcotics partnership with "Vinnie," whom the jury could infer was Vincent Papa. Dilacio and Pannirello had taken over Pugliese's business in the autumn of 1971 and were buying heroin from DiNapoli at $21,000 per kilogram. The possession of large amounts of unexplained cash in connection with evidence of narcotics trafficking on a large scale is similar to the possession of special means, such as tools or apparatus, which is admissible to show the doing of an act requiring those means. *See* 1 J. Wigmore, Evidence § 88 (3d ed. 1940) at 516; *see United States* v. *Bynum,* 360 F. Supp. 400, 419 (S.D.N.Y.), *aff'd,* 485 F.2d 490 (2d Cir.

1973), *vacated and remanded on other grounds,* 417 U.S. 903 (1974). Evidence of *sudden* acquisition of large amounts of money is also admissible to prove criminal misconduct when pecuniary gain, as here, is the basic motive. *United States* v. *Jackskion,* 102 F.2d 683, 684 (2d Cir.), *cert. denied,* 307 U.S. 635 (1939). As then Justice Holmes said in *Commonwealth* v. *Mulrey,* 170 Mass. 103, 49 N.E. 91, 94 (1898) (evidence of deposits too large to be accounted for by salary, admitted), "... it is not necessary that every piece of evidence admitted should be sufficient by itself to prove the crime. Evidence which would be colorless if it stood alone may get a new complexion from other facts which are proved, and, in turn, may corroborate the conclusion which would be drawn from other facts." *See* 1. J. Wigmore, *supra* at § 154 at 601. *See also United States* v. *Tirinkian,* 488 F.2d 873 (2d Cir. 1973). The suggestion that here the large amounts of cash were from another illicit activity, loansharking, goes only to weight, not admissibility, of the evidence; if it represented proceeds from narcotics *and* loansharking the risk of its seizure and introduction was an ordinary business risk.

The argument that so much cash was so sensational, inflammatory and prejudicial as to outweigh its relevancy we find unimpressive. The argument suggests that the cash itself was in the courtroom, but it was made clear to us on argument that at most a photograph of the money was received. The recent case on which the argument is based, *United States* v. *Falley,* 489 F.2d 33 (2d Cir. 1973), is not in point; there a suitcase of odorous hashish and narcotics paraphernalia *unconnected* to the appellants Falley was held inadmissible; the conviction of their codefendant Stolzenberg, to whom the suitcase was linked, was

affirmed.[21] *United States* v. *Stolzenberg*, 493 F.2d 53 (2d Cir. 1974). The fact that the sum of money was considerable is not so remarkable in this day and age as to make it per se inadmissible. *United States* v. *Kenny*, 462 F.2d 1205 (3d Cir.), *cert. denied*, 409 U.S. 914 (1972) (possession of $2,000,000).

II. *A single conspiracy.*

In an effort to establish a variance between the charges in the indictment and the proof adduced at trial, the appellants, all of whom were found guilty on the conspiracy count, argue that the indictment charged only a single conspiracy while the evidence proved the existence of two independent and competing conspiracies, one headed by Inglese and Tramunti and the second run by DiNapoli and Pugliese. *Kotteakos* v. *United States*, 328 U.S. 750 (1946). Appellants argue that the Government failed to show sufficient indicia of criminal partnership such as commingling of assets, a common headquarters or substantial mutual dependence between the two groups, to permit them to be linked together as a single operation. *See United States* v. *Mallah*, No. 74-1327 (2d Cir. Sept. 23, 1974), slip op. 5475, 5479. We disagree. While much of the evidence did indicate that there were two spheres of operation in the narcotics conspiracy that was established, there was sufficient proof of mutual dependence and assistance to warrant treatment of the two spheres as one general business venture.

The testimony of Barnaba is of particular importance in establishing the connection between the Inglese and Di-

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21 *United States* v. *Williams*, 168 U.S. 382 (1897), heavily relied on by appellant DiNapoli, has been sharply criticized by Wigmore, *supra* § 154 n.1 at 601 and limited to its facts in Judge Patterson's *United States* v. *Jackskion*, 102 F.2d 683, 684 (2d Cir.), *cert. denied*, 307 U.S. 635 (1939).

Napoli/Pugliese operations. Barnaba worked for both groups, and while he apparently never distributed for both operations at the same time, it is significant that he could move from one organization to the other with relative ease. Barnaba's move from the Inglese operation to that headed by DiNapoli/Pugliese (a move facilitated by social contacts at the Beach Rose Social Club and elsewhere between the two organizations) indicated that these were not independent competitors. Barnaba was accepted into the DiNapoli operation with complete trust. While he worked with Inglese he was required to pay in advance for drugs to be purchased; however, from the start he was allowed to get substantial amounts of drugs from DiNapoli's operation on consignment. This may be taken as evidence of mutual trust and cooperation between the operations and indicative of the link between them.

In addition, the involvement of DiNapoli's partner, Angelo Mamone, *see* note 12 *supra,* in the Inglese operation further evidenced the groups' interrelationship. Mamone vouched for Barnaba's customer Forbrick in connection with Inglese's operation. Similarly, Mamone resolved a dispute that Barnaba, then a customer of Inglese's, was having over some heroin which Inglese had furnished to Barnaba. Finally, on an occasion in November, 1970, at the Beach Rose Club Inglese called Mamone to count money that Barnaba had received as advance payment from Forbrick for narcotics.

Thirdly, DiNapoli's partner Pugliese had knowledge of intimate details regarding the Inglese operation. After Barnaba had left Inglese and come to work for DiNapoli, Pugliese pointed out in the street a man whom he identified as one of Inglese's customers. Barnaba said he had previously seen the man deliver boxes to Inglese at the

Beach Rose Social Club. Pugliese's reply was, "Them boxes were full of money."

Lastly, the two organizations were linked by sales to common distributors.[22] While this alone would not prove a single conspiracy, the cumulative effect of all of the above is to tend to demonstrate the existence of a single conspiracy linked together by cooperation, trust and a mutual source of supply.[23] In light of all the evidence, the jury was entitled to find as it did, that the defendants belonged to a single loosely-knit conspiracy. *United States* v. *Mallah, supra,* slip op. at 5496-97; *United Sates* v. *Arroyo,* 494 F.2d 1316 (2d Cir.), *cert. denied,* 43 U.S.L.W. 3208 (U.S. Oct. 15, 1974); *United States* v. *Bynum,* 485 F.2d at 495. *See also United States* v. *Cirillo,* 468 F.2d 1233 (2d Cir. 1972), *cert. denied,* 410 U.S. 989 (1973).

Appellants object to the charge on multiple conspiracies as wrong, contradictory and confusing. The charge on mul-

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22 Barnaba made sales to Burke with drugs supplied both by Inglese and by Mamone (DiNapoli's partner). DiGregorio, a courier for the DiNapoli/Pugliese operation, also received drugs from Forbrick who had received his drugs from Inglese by way of Barnaba.

23 There was evidence that through Ralph "The General" Tutino, Inglese sought to buy 12 "packages" (kilograms of heroin) from Papa; he said this in front of Barnaba to appellant Christiano, but that Inglese thought "the General" would "get nothing from him, that guy is nasty, you can't even talk to him." Subsequently Pugliese, who was close enough to Papa to call him "Uncle," apparently because he (Pugliese) had once "pulled a car off a ship for him" with 10 kilos of heroin in it, told Barnaba that Inglese asked him (Pugliese) to get a "package" from Papa for him. Pugliese went on to say that Inglese "was drowning, and 'He wants me to go down with him.'" Appellants argue that all this goes to show two conspiracies and considerable lack of mutual direction or even mutual relationship, but this goes only to weight. The jury may have preferred to think that as the principal source of supply Papa wanted either the top dollar for his product or had worked out some more favorable relationship with DiNapoli. The evidence of Pugliese's cheating the latter by putting some money in a sock is indicative that in this business honorable dealing with one's associates is not the highest ethic.

tiple conspiracies was the same as the one approved in *United States* v. *Bynum*, 485 F.2d at 497, except that the court avoided that part of the charge challenged in *Bynum, supra*,[24] by saying:

> Proof of several separate conspiracies is not proof of the single, overall conspiracy charged in the indictment unless one of the several conspiracies which is proved is the single conspiracy which the indictment charges. What you must do is determine whether the conspiracy charged in the indictment existed between two or more conspirators. If you find that no such conspiracy existed, then you must acquit. However, if you are satisfied that such a conspiracy existed, you must determine who were the members of that conspiracy.
>
> If you find that a particular defendant is a member of another conspiracy, not the one charged in the indictment, then you must acquit that defendant. In other words, to find a defendant guilty you must find that he was a member of the conspiracy charged in the indictment and not some other conspiracy.

We think the charge clear, correct and within the decided cases. By saying that

> In determining whether any defendant was a party, each is entitled to individual consideration of the proof respecting him or her, including any evidence of his

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24 In *Bynum* the court below charged that "if you find that the Government has failed to prove the existence of only one conspiracy you must find the defendants not guilty." This was held, 485 F.2d at 497, not to be a prejudicial "all or nothing" charge condemned in *United States* v. *Borelli*, 336 F.2d 376 (2d Cir. 1964), *cert. denied*, 379 U.S. 960 (1965), since it was made "perfectly clear to the jury that if each of the defendants was not a knowing participant in the single conspiracy he must be acquitted."

> or her knowledge or lack of knowledge, his or her status, his or her participation in key conversations, his or her participation in the plan, scheme or arrangements alleged,

and marshalling the evidence as to each defendant,[25] it was clear to the jury that acquittal was required if there was insufficient proof of participation in the "single, overall conspiracy" charged. The request (*e.g.*, of appellant Christiano) to charge that if multiple conspiracies had been proven then the Government has failed to prove the single conspiracy alleged in the indictment and there must be acquittal, fails to take into account the very real possibility that *one* of the proven conspiracies was the single conspiracy charged.[26] While there is language in *United States* v. *Calabro*, 449 F.2d 885, 894 (2d Cir. 1971), that "it is better practice to instruct the jury that they must

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25 Only Mamone complains of this marshalling upon appeal. Mamone complains that the court's summary of the evidence unfairly omitted reference to his claim that his frequent attendance at the Beach Rose Social Club was for gambling purposes. This was a matter within the court's discretion, however, *United States* v. *Tourine*, 428 F.2d 865, 869 (2d Cir. 1970), and with over 5,000 pages of testimony in an eight-week trial where the judge neither acted as advocate nor sought to impose his own opinions on the jury, we find no error.

26 That the proof may have necessarily included evidence of at least one other conspiracy does not change the situation: evidently there was evidence that Leasa bought both from Papa and from Lentini, who in turn had bought from Jack Spada, a worker for Herbert Sperling. *United States* v. *Sperling*, No. 73-2363 (2d Cir. Oct. 10, 1974), slip op. 5637 (Gov't Brief at 36-40). So too Papa is not exactly a stranger to Second Circuit narcotics annals in connection with other ongoing conspiracies. *See United States* v. *D'Amato*, 493 F.2d at 365 n.4 With regard to a big business which lacks open operation, let alone registration or regulation, lines of corporate or partnership distinction are difficult to draw; in the context of narcotics network cases, seemingly clearcut principles of criminal law are by no means easy to apply. If a court does not lean over backward to blaze new pathways of individual nonresponsibility in hard drug cases, the result is not necessarily bad law.

acquit if they find multiple conspiracies when only one conspiracy is charged," the decision was that a failure so to charge is not error where the charge examined as a whole stresses that there must be finding of the single conspiracy charged and individual knowing participation by each individual in it. *Id.* Our examination of Judge Duffy's charge as a whole indicates that he laid sufficient stress on these elements although the factual pattern here was more complex than in *Calabro, supra. Kotteakos, supra,* it will be recalled, involved a situation in which "the jury could not possibly have found, upon the evidence, that there was only one conspiracy." 328 U.S. at 768. In that situation, where only separate and distinct conspiracies are shown, and the single conspiracy alleged is not proven, acquittal is required and the request must be given. Here, however, where there was proof of the single, overall conspiracy, the fact that there also was evidence adduced of other conspiracies or that the jury could have found two *major* conspiracies does not require a mandatory charge of acquittal.

III. *Sufficiency of the evidence.*

Appellants DiNapoli, Mamone, Gamba and Tramunti each claim that the evidence was insufficient to warrant his conviction(s). Appellants Salley and Alonzo each claim the evidence showed him only to have engaged in a single act, establishing neither knowledge of nor participation in the charged conspiracy. Appellant D'Amico claims that the evidence was insufficient to convict him on the substantive count. The remaining appellants, while incorporating the arguments of all other appellants, do not contend that the evidence was insufficient as to them.

A. *DiNapoli.* DiNapoli's argument is that, absent hearsay, there was insufficient evidence to convict him on either the substantive or conspiracy counts. *See United*

States v. *Cirillo*, 499 F.2d 872, 884-86 (2d Cir. 1974); *United States* v. *D'Amato, supra; United States* v. *Manfredi*, 488 F.2d 588 (2 Cir. 1973), *cert. denied*, 43 U.S.L.W. 3667 (U.S. June 3, 1974). Pannirello and Pugliese, then in the narcotics business, it will be recalled went to 1908 Bronxdale Avenue where Pugliese, after secreting some money in a sock, delivered $8,000 to $10,000 to DiNapoli in Pannirello's presence. DiNapoli argues that this could have been loansharking money and that it is "sheer speculation" to suggest that it was narcotics proceeds. This is similar to the bookmaking argument made by the appellant in *United States* v. *Mallah*, slip op. at 5477, but held insufficient by this court. Here, however much DiNapoli may have also been engaged in loansharking, there was no evidence or indication that Pugliese was in that line of criminal endeavor. The jury could infer from the delivery of the money by Pugliese that it was from narcotics, since he was accompanied by Pannirello, his partner in that business; the jury could also infer from DiNapoli's failure to count the money that Pugliese was an underling, delivering to his boss. Neither of these inferences had to be drawn, but both could have been. The fact that DiNapoli associated with Pugliese both at 1908 Bronxdale Avenue and at the Beach Rose Social Club, while neutral as such, *United States* v. *Di Re*, 159 F.2d 818 (2d Cir. 1947), *aff'd*, 332 U.S. 581 (1948), takes on color in light of the money delivery and confirms the likelihood of the established business relationship. The possession and removal in the night from 1908 Bronxdale Avenue of the $960,000 in $50 and $100 bills, as we have pointed out above, was relevant to establish illicit activity. In the light of Pugliese's payment over of what the jury could infer to have been narcotics proceeds in the same place, the $960,000 could also be taken to be at least in substantial part narcotics proceeds. This was enough

to establish membership in the conspiracy under *United States* v. *D'Amato*, 493 F.2d at 362-65, *Manfredi*, *supra*, and their predecessors, *e.g.*, *United States* v. *Geaney*, 417 F.2d 1116, 1120 (2d Cir. 1969), *cert. denied*, 397 U.S. 1028 (1970). With that established, and the hearsay therefore admissible, concededly there is sufficient evidence on the conspiracy count.

As to the substantive count (Twenty-one), it charged that DiNapoli and Dilacio distributed heroin on or about December, 1971. Pugliese had told Pannirello and Dilacio that the latter was going to pick up the narcotics from Joseph DiNapoli and Pannirello was to make the deliveries. After Dilacio and Pannirello "decided to get in touch with DiNapoli to see if we can get some more narcotics from him," Dilacio told Pannirello that he had called DiNapoli and the latter "was going to give him a kilo" for $22,000. On "[t]he night Pat Dilacio picked up the kilo from DiNapoli," Pannirello went to Gamba's house, which was the "stash," and received a kilo in the form of two packages in a suitcase from Dilacio who said "it was still standing the same," *i.e.*, could be cut four times. Pugliese's and Dilacio's statements were admissible as verbal acts, *D'Amato*, *supra*, showing a plan to buy narcotics from DiNapoli: the narcotics were bought, were of the same high quality as previously supplied to Pugliese for distribution by Dilacio and Pannirello, and it could be inferred that the plan had been carried out. *United States* v. *Annunziato*, 293 F.2d 373, 377 (2d Cir.), *cert. denied*, 368 U.S. 919 (1961). While there was a standing objection to hearsay admitted subject to connection on the conspiracy, Pannirello's assertion that "Dilacio picked up the kilo from DiNapoli" was not objected to as lacking foundation or otherwise and since it was not in form

hearsay may be taken as fact found by the jury. We therefore reject DiNapoli's argument.

B. *Mamone.* Appellant Mamone argues that the Government's proof was only that he associated and had incidental contacts with some of the conspirators, and that the evidence was therefore insufficient. *United States* v. *Bufalino,* 285 F.2d 408, 417-18 (2d Cir. 1960). He was, he claims, at most a "casual facilitator." *See United States* v. *Jones,* 308 F.2d 26, 30 (2d Cir. 1962). His "casual facilitation," however, included helping Inglese count narcotics proceeds, vouching to Inglese for Forbrick's reliability, and resolving a dispute between Burke and Barnaba over the quality of narcotics sold to the former. While Mamone's role was somewhat shadowy, there was enough to permit introduction of the hearsay declaration by Dilacio to Barnaba that since Dilacio was unable to get narcotics from DiNapoli at some point in December, 1971, he was "trying to see his [DiNapoli's] partner, Butchie [Mamone]." Mamone's frequent attendance at the Beach Rose Club taken in this light may have been inferred to be for business reasons. His relationship with both of the main branches of the conspiracy, as we have said, is one of the strongest indicators that there was one overall conspiracy rather than two entirely separate conspiracies.

C. *Gamba.* Appellant Gamba, nicknamed "Sinatra," argues that there was no evidence of his knowledge of and intention to participate in a conspiracy of the scope alleged in the indictment. While admittedly on three or four occasions during a six-month period he allowed his apartment to be used as a place to hide or "stash" heroin, he argues that there was no proof that he knew of the scope of the conspiracy or the conspirators (except for Pannirello, Provitera and possibly Pugliese). He forgets that he also dealt directly with Dilacio who brought heroin

from DiNapoli to Gamba's house, that he was introduced to Pannirello by Pugliese who had used Gamba's house as a "stash" before, and that he received $300 a week for four or five months for permitting his house to be used for storing drugs by Dilacio and Pannirello, this on Pugliese's orders. It would not take a great deal of imagination for Gamba to have considered that someone was selling to Pugliese's henchmen, and that they in turn were distributing to someone else, even if he was not in on all the details, scenarios and players in the cast. As such, it may be that the others did not want him to know so much that he could "sing," but that does not any the less make him a member of the conspiracy. As we recently said in *United States* v. *Ortega-Alvarez,* No. 74-1388 (2d Cir. Nov. 8, 1974), slip op. 345, at 347, "when large quantities of heroin are being distributed, each major buyer [or we would add "stash"] must be presumed to know that he is part of a wide-ranging venture, the success of which depends on the performance of others whose identities he may not even know." While we might not use the phrase "presumed to know," we will settle for "may be taken by the jury to have known."

D. *Tramunti.* Carmine Tramunti has not had his role in this conspiracy discussed previously in this opinion. His connection with the case is not as strong as some of the others', but when analyzed is still beyond the borderline of sufficiency. The connection rests on conversations overheard or participated in by Frank Stasi, who, it will be recalled, first worked as a steward at the Beach Rose, where he saw Inglese almost daily, and did some selling, storing and mixing for him. Stasi overheard the first of these conversations when, on his way to the men's room at the Lo Piccolo, he walked by Inglese (Gigi) and Tramunti; the former told the latter, "I expect some goods.

I am going to need some money." Tramunti nodded his head and they stopped talking as Stasi walked by, except that Inglese told Stasi, "I want to see you, I want to talk to you." After the trip to the men's room, this was altered to "I will see you tomorrow." A couple of days later, Stasi again encountered Inglese who said, "I expected some goods and I didn't get it." There was evidence that Inglese used the words "goods" generally to refer to heroin, which is what he was wholesaling. Whether Tramunti knew that is what he meant does not appear in evidence.

A short time later, Stasi accompanied Vincent ("Vinnie") DiNapoli, brother of Joseph, and Tramunti (who was known as "the old man") to a bistro with the unlikely name of the "Tear Drops Bonsoir" to hear drummer Buddy Rich. After parking the car Stasi joined them at a table with Vinnie DiNapoli's wife, brother Anthony DiNapoli and his girlfriend and two "unescorted females." After some drinks, Tramunti said to Stasi, "I miss the big guy. Without him nothing goes right. You know, the club, there's nothing happening in the club." The "big guy" Tramunti specifically said was "Gigi," *i.e.*, Inglese. Stasi said, "All right, I will go and see him." Stasi did so the next day at the jail in which Inglese was then incarcerated. After casual conversation as to "What's happening outside," a reference to narcotics cohorts DelVecchio and Christiano, and Inglese's saying, "Geez, I wish something happens. This way we could get some money." Stasi said, "You know I seen Carmine about the club and he says about the conversation about the money, yes or no, you would know." Inglese replied, "If you don't know what's happening, I don't know. Just say no." As a result of this conversation, Stasi went to the Lo Piccolo and he told Tramunti, who was watching the card players, "I went to see Gigi. He told me no about

the conversation." Tramunti replied, "All right I guess nothing is happening."

Taken with the previous conversation at the Lo Piccolo and the fact that Inglese had been seriously engaged in the narcotics business, the inference is permissible that Tramunti was at least interested in Inglese's business, if not a financial backer of it. Even so, with just these conversations in mind, there is still no direct tie of Tramunti to Inglese's business or furtherance of its objects, and no proof beyond a reasonable doubt that "goods" meant narcotics to Tramunti or that the phrase "what's happening at the club" or "what's happening" or "nothing's happening" had reference to the narcotics business.

It is not until a subsequent conversation that the direct tie occurs, but it is there, and it is plain, and it casts the previous conversations in their worst light from Tramunti's point of view. At the Lo Piccolo, Stasi heard Inglese tell Tramunti that "We are having a problem getting Moe Lentini out of prison."

The problem in terms of Lentini was not in raising the $75,000 bail necessary to get him out of prison but in providing property as collateral. Tramunti told Inglese to "Try to get him out" but that as to the property, "There's nothing I can do about that." Inglese then remarked to Stasi in Tramunti's presence that "Jeez, I'd like to get him out, because it's important to the organization, because Joe Crow [DelVecchio] right now can't do anything [he was in Inglese's phrase "hot"], and he's [Lentini is] very good with figuring and mixing. So we've got to try to get him out." The jury may well have considered that the statement "we've got to try to get him out" was directed at Tramunti.

No matter how naive Tramunti would have himself taken to be in reference to the jargon-meanings of "goods" and

"what's happening," he learned or knew from this conversation that Lentini was (a) "important to the organization," (b) because he was "very good with figuring and mixing." The inferences that the "organization" was engaged in narcotics because a man who was good at "figuring and mixing" or cutting drugs was important to it is just about irresistible, assuming Stasi was to be believed, which of course we must do. The fact that Tramunti told Inglese to "try to get him out" specifically points up his role as Inglese's boss or partner.

It is interesting that Inglese told Stasi to pacify Lentini's girlfriend, Donna, and that when he went to her house he spoke directly to Lentini on the phone at the West Street federal detention center. Lentini asked whether Stasi could get him out, and when the latter replied that he had no way even of getting himself out if anything happened, Lentini inquired, "What about the old man? Can he do anything." Stasi said, "We just had that conversation now about trying to get you out. Gigi told me to tell you, to tell Donna, but being that I got you on the phone, the old man has someone with property. He'll try to get you out." Lentini was shortly released on bail.

We hold the sum total of these conversations sufficient to permit the jury to infer that Tramunti was a director or higher-up in the "organization," one pretty well shielded to be sure from its day to day operations, but one to whom Inglese, a higher-up, considered himself responsible; that Tramunti was on occasion looked to as a source of funds for organization purchases or bail; and that he was concerned when Inglese's business was slow. This is enough to permit him to have been found a coconspirator. *United States* v. *Manfredi, supra; United States* v. *Ruiz,* 477 F.2d 918, 919 (2d Cir.), *cert. denied,* 414 U.S. 1004 (1973); *United States* v. *Calabro, supra.*

E. *Salley and Alonzo.* Appellants Salley and Alonzo each caim that he was engaged only in a single transaction which does not permit an inference of agreement on his part to enter the overall conspiracy. We have said numerous times that a single act may be sufficient for an inference of involvement in a criminal enterprise of substantial scope at least if the act is of a nature justifying an inference of knowledge of the broader conspiracy. *United States* v. *D'Amato,* 493 F.2d at 365; *United States* v. *DeNoia,* 451 F.2d 979, 981 (2d Cir. 1971). While we recently pointed out that the conflicting line of authority in "single act" cases is explicable on the basis of "the qualitative nature of the act or acts constituting the single transaction (purchase, delivery or the like) viewed in the context of the entire conspiracy." [27] *United States* v. *Torres,* No. 74-1698 (2d Cir. Oct. 8, 1974), slip op. 5619 at 5623-24, we have also said that "when large quantities of heroin are being distributed, each major buyer must be presumed to know that he is part of a wideranging venture, the success of which depends on the performance of others whose identities he may not even know." *United States* v. *Ortega-Alvarez,* slip. op. at 347; *United States* v. *Mallah,* slip op. at 5495-97.

Salley was introduced by Warren Robinson to Provitera and Pannirello as his "man" in October, 1972; Robinson told Provitera to make future deliveries of heroin destined for District of Columbia distribution to Salley. This he did two weeks later. Subsequently at the same Route 46 Howard Johnson's Salley notified the pair that Robinson was on his way; Salley was later present when Robinson gave Pannirello $19,000 in cash, complained about quality and negotiated for more drugs. We think the evidence

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27 This is to say that in a small conspiracy, the evidentiary value of a "single act" in inferring knowledge of the conspiracy is greater than it would be in a broad conspiracy.

sufficient that Salley, while a minor player, perhaps, was an agent or alter ego for a major buyer and as such sufficiently knowledgeable of the overall conspiracy to be considered a member of it. For the narcotics business to work it takes distributors as well as suppliers, mixers and middlemen.

Alonzo, Hattie Ware's brother and also known as "Butch" Ware, bought two ounces of conspiracy heroin from Pannirello at Hattie Ware's apartment, saying "he wanted to get rolling again" and wanted "to start off small" because he didn't have any money. He took the two ounces on consignment and was to pay $2,000 for it. He never completed payment for it, paying no more than $1,600. He never bought any more. He was not a "major buyer," or working for one. We think he is entitled to the benefit of the single act line of cases, led by *United States* v. *Reina*, 242 F.2d 302, 306 (2d Cir.), *cert. denied*, 354 U.S. 913 (1957), the one most specifically in point being *United States* v. *Aviles*, 274 F.2d 179, 190 (2d Cir.), *cert. denied*, 362 U.S. 974 (1960). *See also United States* v. *DeNoia*, 451 F.2d 979 (2d Cir. 1971). This was a large, multi-party conspiracy extending over a period of years. Alonzo's dealings were on one occasion only, with a lesser figure, for a small amount. Viewed in the entire context of the conspiracy his act qualitatively is minuscule. True, he indicated that he had been a dealer before and that he wanted to start dealing again, but he made no other purchase. True also, he was present at the apartment when Pannirello made a delivery to Basil Hansen, but presence alone is not enough. *See United States* v. *Terrell*, 474 F.2d 872, 875-76 (2d Cir. 1973). When the Government throws out its big conspiracy net to catch the big fish in the criminal sea, it has to be aware that an occasional minnow may wriggle free.

F. *D'Amico.* D'Amico urges that the evidence was insufficient to convict him on the substantive count apparently because Stasi, testifying to a $7,000 sale of heroin, erroneously remembered that it was November, 1972, as alleged in the indictment, rather than February, 1973, that he came to D'Amico's apartment. We fail to see the prejudice in this variance, however, and therefore find the evidence sufficient; the discrepancy in terms of amount of drug purchased is likewise immaterial.

IV. *The sufficiency of the Government's pretrial disclosure.*

Appellant Mamone contends that the Government failed to disclose adequately in the indictment and bill of particulars the proof it would present to link him to the conspiracy, thereby denying his sixth amendment rights. Specifically he complains that he was not informed that the Government would offer evidence at trial relating (1) to the alleged assistance he provided to Barnaba with respect to problems with the latter's customer, Burke; (2) to the comments by Dilacio to Barnaba identifying Mamone as Joseph DiNapoli's business partner; and (3) to Mamone's willingness to vouch for Forbrick in connection with narcotics purchases made through Inglese. He argues that he had no opportunity to investigate the reliability of the Government's case.

While neither the indictment nor the bill of particulars in the present case developed in great detail the nature of Mamone's participation in the conspiracy, that is not required. An indictment need only provide sufficient detail to assure against double jeopardy and state the elements of the offense charged, thereby apprising the defendant of what he must be prepared to meet. *United States* v. *Salazar,* 485 F.2d 1272, 1277 (2d Cir. 1973), *cert. denied,* 415 U.S. 985 (1974). Under this test, an indictment need do little more than to track the language of the statute charged

and state the time and place (in approximate terms) of the alleged crime, *United States* v. *Fortunato,* 402 F.2d 79, 82 (2d Cir. 1968), *cert. denied,* 394 U.S. 933 (1969); *United States* v. *Palmiotti,* 254 F.2d 491, 495 (2d Cir. 1958), although in the case of a conspiracy it has been held that at least one overt act must be set forth. *Cf. United States* v. *Grunewald,* 353 U.S. 391, 396-97 (1957); *United States* v. *Luros,* 243 F. Supp. 160, 168 (D. Iowa 1965).[28] Here the indictment followed the language of the conspiracy statute, stated in broad terms the time and place of the crime, and specified some 17 overt acts in furtherance of the crime. The Government was not required to provide in the indictment a detailed statement of all the parties with whom Mamone was alleged to have had dealings during the term of the conspiracy. *United States* v. *Rosa,* 343 F.2d 123, 124 (2d Cir. 1965); *United States* v. *Spada,* 331 F.2d 995, 996-97 (2d Cir.), *cert. denied,* 379 U.S. 865 (1964).

The bill of particulars prepared by the Government elaborated upon the statement in the indictment that Mamone was present at the Beach Rose Social Club in November of 1970 by stating that the Government intended to show that at that time Mamone assisted Louis Inglese in counting the proceeds from a narcotics transaction. Further particularization was not necessary. *See United States* v. *Carroll,* No. 74-1138 (2d Cir. Jan. 6, 1975), slip op. 5963, 5966. In fact, Mamone is unable to demonstrate that an elaboration of the bill of particulars would have been helpful to him in preparing his defense since the evidence which

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28 In fact, the Government may not have been required to prove an overt act in this conspiracy; there is authority to the effect that proof of an overt act is not a necessary element of a conspiracy charged under 21 U.S.C. § 846. *Ewing* v. *United States,* 386 F.2d 10 (9th Cir. 1967), *cert. denied,* 390 U.S. 991 (1968); *Leyvas* v. *United States,* 371 F.2d 714 (9th Cir. 1967); *United States* v. *Garfoli,* 324 F.2d 909 (7th Cir. 1963); *United States* v. *DeViteri,* 350 F. Supp. 550 (E.D.N.Y. 1972); *United States* v. *Gardner,* 202 F. Supp. 256 (N.D. Cal. 1962).

the Government did not disclose to him involved individuals who could not have assisted in that defense: Dilacio was a fugitive, Forbrick had suffered a stroke, and Burke was dead.[29].

Under all of these circumstances, it seems clear that Mamone was not prejudiced in connection with the Government's somewhat limited bill of particulars here. "Whether a bill of particulars should be provided at all, its scope and specificity, if permitted . . . are all matters left primarily to the discretion of the trial judge." *United States* v. *Salazar*, 485 F.2d at 1277-78. *See Wong Tai* v. *United States*, 273 U.S. 77, 82 (1927).

V. *The voir dire examination.*

Appellant Gamba argues that the trial court's voir dire examination was improper in two respects. First, he contends that the questioning of prospective jurors on the possibility of bias in a case involving narcotics was not as extensive as it should have been. Specifically he argues that jurors should have been questioned regarding narcotics use by themselves, their relatives or close friends in order to uncover possible hidden prejudices that they may have had against the appellants.

This argument fails. The trial judge has considerable discretion in conducting the voir dire. In almost any case there can be developed a series of questions designed to uncover some possible juror prejudice, but the orderly functioning of the judicial process requires that the trial court be allotted some flexibility to place reasonable limitations on juror examination. *United States* v. *Zane*, 495 F.2d 683

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29 Mamone's brief states that Burke was killed in a domestic quarrel; the record of this case contains no such information. In any event, it seems clear that by Mamone's admission it would not have been helpful for the Government to have provided Mamone with information concerning his involvement with Barnaba and Burke.

(2d Cir. 1974); *United States* v. *Ruggiero*, 472 F.2d 599 (2d Cir.), *cert. denied*, 412 U.S. 939 (1973); *United States* v. *Colabella*, 448 F.2d 1299, 1303 (2d Cir. 1971), *cert. denied*, 405 U.S. 929 (1972). *But cf. United States* v. *Grant*, 494 F.2d 120 (2d Cir. 1974); *United States* v. *Dellinger*, 472 F.2d 340 (7th Cir. 1972), *cert. denied*, 410 U.S. 970 (1973). Our examination of the record in this case discloses that in addition to broad questions regarding juror bias, the trial judge specifically asked whether the jurors would be prejudiced because this case involved narcotics, and whether the jurors or their families had been the victims of a crime. He was required to do no more in respect to narcotic use by family or friends. *Cf. United States* v. *Bradley*, 447 F.2d 224 (2d Cir.), *cert. denied*, 404 U.S. 947 (1971).

Appellant Gamba also assigns as error the trial judge's refusal to allow his challenge for cause of a juror who, after the jury was sworn but before testimony was taken, informed the court that his wife's stepson had became an addict *after* he and his wife had separated. While there is some confusion in the record regarding the closeness of the juror's relationship to his wife's stepson, the juror was firm in his statement that he would not be influenced in this case by his wife's stepson's addiction. As this court stated in *United States* v. *Ploof*, 464 F.2d 116, 118 n.4 (2d Cir. 1972),

> There are few aspects of a jury trial where we would be less inclined to disturb a trial judge's exercise of discretion, absent clear abuse, than in ruling on challenges for cause in the empanelling of a jury.

Here there is no proof of clear abuse by the trial judge. When questioned by the trial judge, all indications pointed to the conclusion that the juror was convinced that he

would not be influenced by his wife's stepson's addiction in deciding this case, and that the only reason the juror raised the issue was in an attempt to perform his duties scrupulously.

VI. *The admissibility of the photograph of appellant Hattie Ware.*

Appellant Hattie Ware contends that a photograph seized in the search of Basil Hansen's apartment was obtained in violation of her constitutional rights. Her claim focuses on an interrogation which led to the seizure.

On October 3, 1973, appellant Ware was arrested pursuant to a valid warrant, and at that time was given proper warnings under *Miranda* v. *Arizona,* 384 U.S. 436 (1966). Later that same day, she was again advised of her constitutional rights and then questioned on her participation in the sale of narcotic drugs. During the questioning, she was asked about various addresses and telephone numbers found in her pocketbook, and she willingly identified all but one of these.

When she refused to identify this one address and telephone number, she was asked if they belonged to Basil Hansen. At this point, appellant Ware began to cry. In the light of this refusal to respond, Government agents went to the address and found a number of items relevant to their investigation including pictures of appellant Ware socializing with appellant Pugliese.

Under all of these circumstances, there is no merit to appellant's claim that her constitutional rights were violated in a situation where the police acted upon her refusal to identify an address which she had in her possession.

Under *Miranda,* in the light of appellant's right to refuse to answer the agents' questions, not only any answers elicited from her after she expressed an unwillingness

to continue would be inadmissible but also the interrogation must stop. 384 U.S. at 473-74. But *Miranda* does not prevent the interrogating officer from drawing reasonable inferences from the behavior of the person being questioned, in this case, a refusal to answer specific questions asked her by the Government agents after responding to others. The refusal to identify the number, altogether aside from the repetition of the question and accompanying tears, was itself sufficient to provide probable cause for the agents to search the apartment. The improper subsequent interrogation and the tears cannot be deemed to "taint" the previous inference drawn.

VII. *The issuance of a bench warrant for appellant Springer and the introduction of narcotics seized upon the execution of the warrant.*

Appellant Springer claims that the bench warrant issued for his appearance in court on December 3, 1973, was both insufficient on its face and issued in an abuse of the trial judge's authority. In addition, he argues that certain narcotics and related paraphernalia which were seized at his home when the bench warrant was executed were seized illegally and should not have been received in evidence. The issuance of the bench warrant was not an abuse of discretion. The warrant was issued when, after receiving notification, Springer failed to appear in court on December 3, 1973; its issuance, however, was surely influenced by the fact that on at least two prior occasions Springer had similarly failed to appear for scheduled pretrial conferences.

As for the sufficiency of the warrant, the appellant argues for the first time on appeal that the warrant was improperly drawn and therefore invalid since it incorrectly stated that there was pending an indictment charg-

ing him with jumping bail (rather than with a violation of the federal narcotics laws). This error, apparently a clerical one, in no way voids his arrest. He was named in an indictment, he was properly notified, and a bench warrant was properly issued for his appearance. The fact that the warrant referred to the wrong charge does not make it invalid here. *Cf. United States* v. *Pisano*, 193 F.2d 361, 363-64 (7th Cir. 1951).

Appellant has raised the question of the sufficiency of the warrant in an effort to invalidate the seizure of a quantity of drugs found in his apartment when the warrant was executed. When the officers went to Springer's apartment pursuant to the warrant and the door was opened, however, they saw Springer standing behind a counter with white powder and aluminum foil on it, apparently mixing heroin. His arrest was thus proper as for a felony committed in the officers' presence even without a valid warrant. It follows also that the seizure of the narcotics would have been proper under the "plain view" doctrine. *Harris* v. *United States*, 390 U.S. 234 (1968); *United States ex rel. Williams* v. *LaVallee*, 415 F.2d 643 (2d Cir. 1969), *cert. denied*, 397 U.S. 997 (1970).

Springer's arguments concerning the admissibility of the drugs and related paraphernalia are little more convincing. Springer contends that this "real" evidence was irrelevant to the charges contained in the indictment since it was seized from him after the termination of the conspiracy. The drugs were admitted, however, only with the limiting instruction that they were not to be considered by the jurors in connection with the conspiracy count. This instruction may well have been to the benefit of the appellant, since there is precedent to the effect that the narcotics seized after the termination of the conspiracy were admissible to show the existence of the conspiracy, since conduct of a conspirator, not consisting

of a hearsay declaration, is admissible to prove the existence of the conspiracy even though occurring after the termination of it. *See Anderson* v. *United States,* 42 U.S.L.W. 4815, 4818 (U.S. June 3, 1974); *United States* v. *Bennett,* 409 F.2d 888, 892 (2d Cir.), *cert. denied,* 396 U.S. 852 (1969). *But see Krulewitch v. United States,* 336 U.S. 440 (1949) (hearsay declaration inadmissible). In addition, the drugs were admissible as proof of similar subsequent conduct by Springer tending to show intent or state of mind with respect to the conspiracy in question, which was the basis on which the court below admitted them. *United States* v. *Mallah,* slip op. at 5488-89; *United States* v. *Cohen,* 489 F.2d 945, 949 (2d Cir. 1973).

Springer also maintains that the evidence was not sufficiently connected to him to have been admitted against him, but in light of the facts surrounding the seizure, which indicated that Springer was apprehended while in the process of diluting heroin, this argument is wholly unconvincing.

VIII. *The in-court identification of appellant Salley.*

Appellant Salley contends that an in-court identification made by the Government witness Provitera should have been ruled inadmissible because it was tainted by a prior identification of Salley by Provitera in an impermissibly suggestive photo display. The photograph display was as Salley contends quite clearly suggestive since the photograph of Salley contained in the photo spread was much larger than any of the other 18 photos and additionally was the *only* picture which was not a mug shot. But under *Simmons* v. *United States,* 390 U.S. 377, 384 (1968), for an in-court identification to be inadmissible the prior identification must have also been of such a nature to give rise to a "substantial likelihood of irreparable misidentification" when considered in the light of the "totality

of the circumstances." *Neil* v. *Biggers*, 409 U.S. 188 (1972); *United States* v. *Evans*, 484 F.2d 1178, 1185 (2d Cir. 1973); *United States ex rel. Phipps* v. *Follette*, 428 F.2d 912, 914-15 (2d Cir.), *cert. denied*, 400 U.S. 908 (1970). Provitera had met Salley on at least three occasions at the Route 46 Howard Johnson's and on one of the occasions had spent a considerable amount of time—at least half an hour—in the restaurant there with him. Under these circumstances, there was ample evidence to establish an independent basis for Provitera's identification of Salley, and accordingly there was no substantial likelihood of misidentification. *Haberstroh* v. *Montanye*, 493 F.2d 483 (2d Cir. 1974); *United States* v. *Counts*, 471 F.2d 422, 424-25 (2d Cir.), *cert. denied*, 411 U.S. 935 (1973).

IX. *Appellant Salley's denial of the effective assistance of counsel.*

Salley's claim of having been denied the effective assistance of counsel raises a substantial issue which requires the granting of a new trial. The trial began on January 21, 1974. Salley's first attorney died suddenly on February 5, 1974, during the middle of the trial. A new attorney was appointed the following day and testimony resumed on February 7. Salley's new counsel immediately moved for a continuance until February 11, but his request was denied. Under these circumstances, this being a complex conspiracy case, we hold that Salley's new attorney had insufficient time to prepare his defense.

In reaching the conclusion that the attorney's death in the middle of the trial was a ground for severance or continuance as to that defendant, we recognize that it is not an inevitable one, for every case. The record indicates that the Government attempted to provide Salley's new counsel with all of the information generally available to

a defense attorney and in addition an effort was made to bring the new attorney up to date on the trial. We are also aware of the fact that although the trial resumed on February 7, no testimony directly implicating Salley was introduced until February 13. And there is something to be said for the Government's suggestion that in a trial such as this, Salley's interests were to a certain degree represented by the attorneys for the other defendants—at least it was in the interests of all the defendants to attack the credibility of Government witnesses.[30] We assume, moreover, that Judge Duffy's decision to deny the continuance must have been influenced by the fact that the trial was certain to be a relatively long one (it turned out to be eight weeks) and the jury had been sequestered. Balancing all of these factors against Salley's right to the effective assistance of counsel, however, we nevertheless conclude that the brief continuance requested by Salley's counsel should have been granted. This is not a case where a defendant has deliberately attempted in bad faith to delay a trial by seeking new counsel. *United States* v. *Maxey*, 498 F.2d 474 (2d Cir. 1974). The request, made on a Thursday, February 7, would apparently have resulted in a delay of only two trial days as Salley's counsel said he would be ready for trial on Monday, February 11. In the light of the abundance of materials with which Salley's new attorney had to familiarize himself, we are almost forced to assume that his client was prejudiced by the inadequate amount of time that he had to prepare his case. *See United States* v. *Mitchell*, 354 F.2d 767, 769 (2d Cir. 1966).

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30 This is not to say that the interests of the defendants were by any means identical. Quite to the contrary, Salley could not be represented by any of the other attorneys already participating at the trial because of the considerable potential of conflicting interests.

No per se rule can be stated to cover all situations where an attorney's death (or illness) necessitates the appointment of new counsel in the midst of a trial. As the Supreme Court recognized in one of its earliest opinions,

> In questions of this nature [motion for continuance because of the death of an attorney], we must be governed by a sound discretion; in order to prevent, on the one hand, an unnecessary procrastination, and, on the other hand to avoid an injurious precipitation of trial. . . . It is true that counsel might even at this time be employed, so as to admit, perhaps, of an argument before the court rises; but it is reasonable, that in a cause of such magnitude, the counsel should have an opportunity to investigate the principles, and to consider the authorities connected with it, out of term, and unencumbered by the pressure of the current business of the Court.

Hunter v. *Fairfax*, 3 U.S. (3 Dall.) 305, 305-06 (1796). Here the inability to prepare for trial would have made it difficult for Salley's attorney to disassociate his client from the other defendants, or to discredit Government witnesses (even though they were not initially testifying against Salley directly). We do not say that Salley's defense was so inadequate as to amount to a "mockery of justice," *United States* v. *Wright*, 176 F.2d 376, 379 (2d Cir. 1949), *cert. denied*, 338 U.S. 950 (1950); but faced with the present factual setting, particularly the element of a complex multidefendant trial, we are constrained to find the denial of a continuance to constitute reversible error.

So saying, we are not articulating a new standard for the length of time necessary for an attorney to prepare

a criminal case.[31] Our conclusions are limited to the facts presently before us, and speak only to the situation where a motion for continuance[32] is made because counsel must be replaced in the midst of trial because of death or established illness.

X. *The admissibility of certain testimony concerning appellant Pugliese.*

Appellant Pugliese contends that it was error for the trial court to receive into evidence (1) testimony by two Government witnesses that he (Pugliese) had shot co-conspirator DiGregorio ("Paulie, the Arrow") in the knee and (2) testimony that he had been sent to jail in October of 1971. Pugliese maintains that this evidence of separate crimes was introduced by the Government solely to show Pugliese as a professional criminal and a man of violence. *See United States* v. *Brettholz*, 485 F.2d 483, 487 (2d Cir. 1973). Quite to the contrary, however, all of the evidence in question was related to the conspiracy being tried and of probative value.

The incident regarding the shooting of DiGregorio was related by Government witnesses Barnaba and Dawson. Barnaba told the story as it had been related to him by Pugliese. Dawson repeated DiGregorio's statement on the shooting. Both stories indicate that DiGregorio was shot when he failed to pay Pugliese for certain drug purchases

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31 Nor are we willing to accept appellant's position that a two-week continuance would have been an appropriate length of time for a continuance. *United States* v. *Bentvena*, 319 F.2d 916, 934 (2d Cir.), *cert. denied*, 375 U.S. 940 (1963).

32 On this basis it is unnecessary for us to consider the prejudicial effect of Salley's first counsel's having told the jury in opening argument that he (Salley) would take the stand, while his second attorney advised him not to do so. We reject, however, the Government's argument that this could not conceivably have been prejudicial.

—he had been "short with the money." The shooting was thus admissible as evidence of the kind of enforcement techniques that Pugliese was willing to resort to in furtherance of the ends of the conspiracy in question. *See United States* v. *Bynum,* 485 F.2d at 498-99; *United States* v. *Persico,* 425 F.2d 1375, 1384 (2d Cir.), *cert. denied,* 400 U.S. 869 (1970).

Likewise admissible was evidence of Pugliese's going to jail in October of 1971. This evidence was introduced only on redirect examination of the witness Barnaba after defense counsel had questioned Barnaba about his introduction by Pugliese to Dilacio and Pannirello. On direct, Barnaba had only said that Pugliese was "going away" and that preparations were being made to run his drug operation while he was absent. Only after defense counsel had ridiculed Barnaba's testimony[33] was the further explanation offered that an introduction of Barnaba to Dilacio and Pannirello was necessary since Barnaba would be doing business with them while Pugliese was in jail. Defense counsel had opened the door for the introduction of this very relevant evidence concerning the operation of this conspiracy.

In addition, Pugliese's activities during incarceration were relevant to prove his role in the continuance of the conspiracy charged here. Pugliese's ability to direct and profit from a drug operation even while in jail was probative evidence to show the extent of his power in the entire conspiracy, if not the extent and nature of the conspiracy. *See United States* v. *Agueci,* 310 F.2d 817, 839 (2d Cir. 1962), *cert. denied,* 372 U.S. 959 (1963).

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33 Counsel asked Barnaba whether he had been paid money for the introduction and upon receiving the reply "None that I know of" retorted, "So he did it because you were a nice guy, is that right?"

XI. *The Government's summation.*

Most of the appellants contend that the summation by the Government was improper. They urge that the United States Attorney brought the prestige and reputation of the government of the United States and his office before the jury in an effort to convince them of the guilt of the appellants. Examples of the allegedly prejudicial behavior included comments by the United States Attorney regarding the esteem he had for his "client," the United States of America, and a statement characterizing his assistants as "your Government's representatives." In addition, the United States Attorney made the following statement:

> But in deciding this case, we would like you to try us, the government. In fact, we urge you to try us. Try us with a careful review of all the facts that are before you; before you in evidence on the record, in pictures, in documents, on tapes. When you do this we submit you will find that the government and its witnesses have been entirely candid and truthful. (Tr. at 5031.)

In the context of the trial and balanced against the tactics of the defense lawyers in this case, we find none of the foregoing statements prejudicial. *United States* v. *Benter*, 457 F.2d 1174 (2d Cir.), *cert. denied*, 409 U.S. 842 (1972).

Throughout the trial, the defense lawyers took the position that none of the Government witnesses were credible, and the theme recurs throughout the defense summations that the Government's case was complete fabrication. Tramunti's attorney referred to Stasi's testimony as "bought, paid for and edited." Robinson's counsel said, "I don't blame Mr. Curran . . . for putting on these witnesses. . . . The agents give him a case, and has to prosecute it. . . . He does the best he can with what he has," but added (as to

Dawson), "He doesn't do a day in jail. He made some deal. The man has a license to steal, the man has a license to sell drugs if he pulls the wool over your eyes. . . ." Counsel for Russo said (as to Barnaba), "If he expected the U.S. Attorney to get up on his behalf, he'd better produce in here. And I suggest to you that's what he is doing and did. It's a production, a fabrication." Counsel for Mamone said as to the prosecution: "Do they have to show tangible acts of wrongdoing on the part of that person, on the part of Mamone? No. We will throw him in. It might stick. It might stick."

The statements by the United States Attorney must thus be viewed as an attempt to offer a rebuttal to the attacks made directly against his witnesses and directly or indirectly against his office. In the main, his statements were confined to a detailed summary of the Government's case with constant reference to the record before the jury. His relatively subdued comments in reply we do not find improper. *United States* v. *DeAngelis*, 490 F.2d 1004, 1011 (2d Cir.), *cert. denied*, 416 U.S. 956 (1974); *United States* v. *LaSorsa*, 480 F.2d 522 (2d Cir. 1973).

Similarly unconvincing are appellants' claims that the Government made prejudicial remarks concerning the presence of Vincent DiNapoli, one of Joseph DiNapoli's brothers, in the courtroom and his apparent unwillingness to offer testimony to rebut the Government's case. Appellants claim that these remarks were made for the sole purpose of making it appear that the Government witnesses were being subjected to subtle threats or intimidation. To the contrary, it appears that the statement regarding Vincent DiNapoli was to the effect that if the testimony of Government witness Stasi as to the evening with Tramunti at the Tear Drops Bonsoir was false, it could have been disproved by Vincent DiNapoli. His failure to testify was

thus properly brought before the jury. *See United States* v. *Dioguardi*, 492 F.2d 70, 82 (2d Cir.), *cert. denied*, 43 U.S.L.W. 3212 (U.S. Oct. 15, 1974).

XII. *The marshalling of the evidence by the trial court.*

Appellant Mamone raises the issue of the manner in which the trial judge summarized the testimony. He contends that the trial judge committed error by failing to give an equal amount of time to both the Government and defense cases in his statement. We reject the argument. Faced with considerable evidence to distill into a statement of facts which would make his charge on the law understandable, Judge Duffy made every effort not to take over the jury's fact finding role. He explicitly reminded them with the standard disclaimer:

> These are duties completely within your purview and I will not interfere with your province. And if through some inadvertence I misstate some evidence, as well I might, please, please disregard any such statement by me that does not accord with your recollection of what the evidence was. (Tr. at 5320-22.)

In the light of the broad discretion given to trial judges in summarizing the evidence in a case, *United States* v. *Tourine*, 428 F.2d 865 (2d Cir. 1970), *cert. denied*, 400 U.S. 1020 (1971), we find no error in Judge Duffy's marshalling of the facts in this complicated, multiparty conspiracy case.

XIII. *The prior inconsistent statement of Government witness Stasi.*

Stasi, it will be recalled, testified on direct examination that he overheard Inglese tell Tramunti that he (Inglese) was expecting some "goods" and therefore needed

money from Tramunti. On cross-examination Stasi was questioned about whether he had heard the work "goods" or the word "something" in the conversation between Tramunti and Inglese, and he was confronted with his own previous statements during police debriefings in which he had used the word "something" rather than the word "goods." On redirect, Stasi was asked why he had made prior inconsistent statements, and he answered that he had been "afraid" of Tramunti. Tramunti's lawyer moved for a mistrial at this point. At the close of the trial, Tramunti's lawyer requested that the judge give a limiting instruction to the jury explaining that Stasi's statement concerning his fear of Tramunti could be considered only as evidence of the witness's state of mind, not for the truth of the statement itself. His point was, of course, that when, in an effort to explain an earlier refusal to testify or prior inconsistent statements, a witness relates facts (*i.e.*, a threat to his life, a conversation which could be interpreted as being intended to intimidate), the jury should be instructed that such evidence is not to be understood as establishing, for example, that a threat was really made, but should have value only as evidence that the witness believed, rightly or wrongly, that he was in danger, thus explaining his conflicting testimony. *United States* v. *Malizia, supra,* at 5467; *United States* v. *Cirillo,* 468 F.2d 1233 (2d Cir. 1972), *cert. denied,* 410 U.S. 989 (1973); *United States* v. *Berger,* 433 F.2d 680 (2d Cir. 1970), *cert. denied,* 401 U.S. 962 (1971).

But here there was no elaboration by Stasi of the facts which led him to be afraid of Tramunti. The request for a limiting instruction came four weeks after the testimony was received. Even conceding that an instruction should have been given, upon request, at the time, to have refused it later cannot be deemed reversible error, at least where as here there is much to be said for the proposition that

the jury could only have understood his statement as going to his state of mind, in any event.

XIV. *Springer's sentence.*

Appellant Springer contends that the sentence imposed upon him was unnecessarily harsh and should be reviewed by this court. Admittedly, the concurrent 15-year terms that were meted out were rigorous, but they were within permissible limits and based on permissible factors, and hence not subject to review. *Dorszynski* v. *United States*, 42 U.S.L.W. 5156, 5161 (U.S. June 26, 1974).

XV. *Appellants' other claims.*

Appellants' other claims have been considered by this court; however, all are found to be meritless and none are found to be substantial enough to merit elaboration in this already lengthy opinion.

Judgment affirmed as to Joseph Ceriale, Donato Christiano, Vincent D'Amico, Joseph DiNapoli, John Gamba, Louis Inglese, Angelo Mamone, Frank Pugliese, Warren C. Robinson, Frank Russo, John Springer, Carmine Tramunti and Hattie Ware.

Judgment reversed as to appellant Alonzo.

Judgment reversed and remanded as to appellant Salley.

All motions for remand denied.

APPENDIX B — PETITION FOR A REHEARING IN BEHALF OF JOSEPH DI NAPOLI DENIED APRIL 28th, 1975

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

At a stated term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the twenty-eighth day of April, one thousand nine hundred and seventy-five.

United States of America,

Plaintiff-Appellee,

v.

Carmine Tramunti, John Springer, Henry Salley, John Gamba, Vincent D'Amico, Angelo Mamone, Louis Inglese, Joseph Delvecchio, Donato Christiano, Thomas Lentini, Joseph DiNapoli, Carmine Papliese, Pat Dilacio, Frank Pugliese, Joseph Ceriale, Anthony Loria, Dominick Lessa, Benjamin Tolopka, George Toutoian, Frank Pellegrino, Joseph Marchese, Richard Forbrick, Frank Russo, Warren C. Robinson, Thomas Dawson, Al Greene, William Alonzo, Hattie Ware, Mary Jane Salviani, Basil Hansen, Estelle Hansen, John Doe a/k/a Jimmy Wyatt Earp,

Defendants,

Appendix B — Petition for a Rehearing

John Springer, Henry Salley, John Gamba, Vincent D'Amico, Warren C. Robinson, William Alonzo, Frank Russo, Carmine Tramunti, Joseph Ceriale, Joseph DiNapoli, Hattie Ware, Frank Pugliese, Donato Christiano, Louis Inglese, Angelo Mamone,

Defendants-Appellants.

74-1550

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by counsel for the appellant, Joseph DiNapoli, and no active judge or judge who was a member of the panel having requested that a vote be taken on said suggestion,

Upon consideration thereof, it is

Ordered that said petition be and it hereby is denied.

s/ Irving R. Kaufman
IRVING R. KAUFMAN
Chief Judge

APPENDIX C — PETITION FOR A REHEARING EN BANC IN BEHALF OF JOSEPH DI NAPOLI DENIED APRIL 28th, 1975

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the twenty-eighth day of April, one thousand nine hundred and seventy-five.

Present: HON. STERRY R. WATERMAN

HON. JAMES L. OAKES,

HON. MURRAY I. GURFEIN,

Circuit Judges.

(Same Title)

A petition for a rehearing having been filed herein by counsel for the appellant Joseph DiNapoli,

Upon consideration thereof, it is

Ordered that said petition be and hereby is DENIED.

s/ A. Daniel Fusaro,
Clerk